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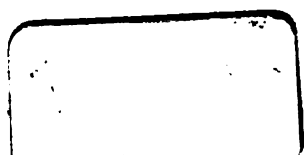
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Courts of Exchequer & Exchequer Chamber,

FROM

HILARY TERM, 6 VICT.

TO

TRINITY VACATION, 6 VICT., BOTH INCLUSIVE;

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY

R. MEESON, Esq., AND W. N. WELSBY, Esq.,

OF THE MIDDLE TEMPLE, BARRISTERS-AT-LAW.

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JUDGES
OF THE
COURT OF EXCHEQUER,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honourable JAMES, Lord ABINGER,
Chief Baron.

BARONS.

The Right Honourable Sir JAMES PARKE, Knt.
Sir EDWARD HALL, ALDERSON, Knt.
Sir JOHN GUENEY, Knt.
Sir ROBERT MONSEY ROLFE, Knt.

ATTORNEY-GENERAL.

Sir FREDERICK POLLOCK, Knt.

SOLICITOR-GENERAL.

Sir WILLIAM WEBB FOLLETT, Knt.



A

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ERRATA.

- Page 5, marginal note, l. 4, *for* house *read* furnished house.
— 16, note, *for* ante, p. 101, *read* 10 M. & W. 101.
— 63, marginal note, l. 6, *for* set aside *read* disallowed.
— 75, l. 10 from bottom, *for* with power *read* who is.
— 189, l. 7, *for* illata *read* relata.
— 204, l. 10, *for* of *read* for; l. 13, *for* of a contract *read* evidence of a contract.
— 232, l. 7 from bottom, *for* has been held *read* is admitted.
— 515, last line but one, *for* it would *read* it would not.
— 517, marginal note, l. 29, and 526, l. 1, *for* their joint lives *read* both their lives.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

HILARY TERM, 6 VICT.

Esch. of Pleas,
1843.

Jan. 13.

TODD and Another v. EMLY and Another.

A NEW trial of this cause having been directed, on the ground that the plea puis darrein continuance of the release of Mr. Stewart, which the defendants proposed to plead at the last trial, ought to have been received (*a*), the cause was tried again (for the fourth time) before Lord Abinger, C. B., at the last Surrey Assizes: when it appeared, that on the 25th of June last, after the rule for a new trial was made absolute, but before issue was joined on the plea of release, Mr. Stewart had cancelled the release by tearing off the seal. The plaintiffs afterwards (14th July) delivered a replication of non est factum; to which the defendants rejoined, that "the said deed is the deed of the

To a plea of a release by the plaintiffs of a co-contractor with the defendants, the plaintiffs replied non est factum, to which the defendants rejoined "that the said deed is the deed of the plaintiffs," on which issue was joined. *Semble*, that this issue would be supported by the production of the release in a cancelled state,

it having been cancelled by the releasee after the plea was pleaded, but before the issue joined.

(*a*) See 9 M. & W. 606.

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1843.

TODD
v.
EMLY.

plaintiffs," upon which issue was joined. The defendants called upon Mr. Stewart, under a subpoena duces tecum, to produce the release, when it appeared that he had delivered it to his clerk, to be given to the plaintiffs, and that when applied to on the subject by the defendants' attorney, he had referred him to the plaintiffs' attorneys; who, on application to them, declined to give any information who was the subscribing witness to the deed. Mr. Stewart's clerk was not in attendance at the trial; and the possession of the deed being thus unaccounted for, the Lord Chief Baron refused to receive secondary evidence of its contents, and the plaintiffs had a verdict.

In Michaelmas Term, *Thesiger* obtained a rule nisi for a new trial, on the grounds that under the circumstances the plaintiffs had a right to give secondary evidence of the deed, without proving it by the subscribing witness, and that the replication of non est factum had reference to the date of the plea to which it was an answer, at which time the deed was an existing and valid instrument, and therefore the proof of it would have entitled the defendants to a verdict.

Platt and *Petersdorff* now shewed cause.—The defendants are not entitled to make this rule absolute, inasmuch as the release, had it been proved at the trial, would not have entitled them to the verdict. The issue taken by the rejoinder is in the present tense, that the deed *is* the deed of the plaintiffs, and must be taken to have reference to the time, not of the plea pleaded, but of issue joined, and at that time the deed had no existence. This view of the case is supported by many authorities. In *Nichols v. Haywood* (a), in debt on bond, and non est factum pleaded, it appeared that, before the trial, the bond and the labels of the seal had been eaten by mice; and the jury were charged to inquire if it was the defendant's deed at the

(a) Dyer, 59 a.

time of plea pleaded. The law is laid down in similar terms in *Whelpdale's case* (a) (third resolution), and *Michael v. Scockwith* (b), that the question refers to the time of pleading, whether plea or replication, and is whether the instrument *then* exists as a deed. So in *Fisher v. Ford* (c), where the plaintiff in covenant alleged as excuse for not making profert, that the deed "being in the possession of the defendant," the plaintiff was unable to produce it, a plea that the deed "*is* not in the possession of the defendant," *modo et formâ*, was held to apply to the time of plea pleaded, and therefore to be insufficient. It is stated in all the treatises on evidence, that *non est factum* puts in issue whether the deed be the defendant's deed at the time of pleading; 1 Phill. Evid. 133; 2 Stark. Evid. 376; and the same rule must apply to subsequent pleadings. [*Parke, B.*—It would appear then that the replication is bad, because it ought to have shewn that the deed was not at any time the deed of the plaintiffs.] That might have been ground for a demurrer, but the only question now is, what was the issue in fact. It is like the plea of *nil debet* before the new rules, under which, being in the present tense, matter subsequent to the accruing of the cause of action might be given in evidence.

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Thesiger, contra.—This question must undoubtedly be decided by the principles applicable before the new rules, which do not apply to replications and subsequent pleadings. But all the cases cited on the other side were cases of actions brought on the instrument itself. Until the decision in *Read v. Brookman* (d), it was necessary to make profert of every deed pleaded; and on *non est factum*, the plaintiff was bound to prove a deed in the state in which it must be produced to the Court. But since it has been

(a) 5 Rep. 119.

D. 347.

(b) Cro. Eliz. 120.

(d) 3 T. R. 151.

(c) 12 Ad. & E. 654; 4 P. &

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admitted that profert might be excused on the ground that the deed was lost or destroyed, or that it was in the possession of the other party, or of a person by whom the party pleading it had no power to compel its production, *Bolton v. Bishop of Carlisle* (a), *Bain v. Cooper* (b), *Dangerfield v. Thomas* (c), the strict rule laid down in the old cases is no longer applicable. If, indeed, the party choose nevertheless to plead it with a profert, he must fail unless he produces the deed: *Smith v. Woodward* (d), *Matison v. Atkinson* (e), *Whitfield v. Fausset* (f), *Ex parte Greenway* (g). But here the issue would have been supported by proof of the cancelled instrument. Cancellation by consent no doubt destroys a deed creating an interest inter partes: *Shep. Touchst.* 70, *Dennis v. Payne* (h); but although this may operate as an avoidance of the deed as between the parties to it, it may still be produced in evidence by a third party. In *Bolton v. Bishop of Carlisle*, the plaintiff must have been allowed to produce the cancelled instrument in support of his case. There are cases also to shew that a deed which has been improperly cancelled as against a party to it, may be considered, as against the canceller, as an existing deed: *Beckrow's case* (i), *Woodward v. Aston* (k). [*Parke, B.*—It is the deed of the parties in the sense in which the word is used in the plea.]

PARKE, B.—The cases which have been referred to certainly afford strong ground for supposing that the meaning of this replication is, that it is not the deed of the plaintiffs for the purpose of proving a release: and therefore that the issue is proved by the production of a deed

(a) 2 H. Bl. 259.

(b) 8 M. & W. 751.

(c) 9 Ad. & E. 292; 1 P. & D.
287.

(d) 4 East, 585.

(e) 3 T. R. 153, n.

(f) 1 Ves. sen. 389.

(g) 6 Ves. 812.

(h) March, pl. 165.

(i) Hetley, 138.

(k) 1 Ventr. 296.

which has operated as a release, although now in a cancelled state. Under all the circumstances of the case, we are of opinion that the defendants are entitled to a new trial on payment of costs, on the ground of surprise.

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LORD ABINGER, C. B., ALDERSON, B., and GURNEY, B., concurred.

Rule absolute accordingly.

SMITH v. MARRABLE, Knt.

Jan. 14.

ASSUMPSIT for use and occupation. Plea, non assumpsit. At the trial before Lord Abinger, C. B., at the Middlesex sittings after Michaelmas Term, it appeared that the action was brought to recover a balance of five weeks' rent of a furnished house at Brighton, which had been taken by the defendant of the plaintiff under the following agreement:—

It is an implied condition in the letting of a *furnished* house, that it shall be reasonably fit for habitation; if it be not (e. g. where it is greatly infested with bugs), the tenant may quit it without notice.

“ Brighton, September 14, 1842.

“ Mr. John Smith, of 24, St. James's-street, agrees to let, and Sir Thomas Marrable agrees to take, the house No. 5, Brunswick-place, at the rent of eight guineas per week, for five or six weeks at the option of the said Sir Thomas Marrable.

“ THOMAS MARRABLE.

“ JOHN SMITH.

“ The rent to commence on the 15th September.

“ T. M.

“ J. S.”

Under this agreement, the defendant and his family entered into possession of the house on Friday the 16th of September. On the following day, Lady Marrable having complained to the plaintiff that the house was infested with

Exch. of Pleas, bugs, he sent a person in to take means for getting rid of them, which however did not prove successful ; and on the 19th, Lady Marrable wrote the following note to the wife of the plaintiff:—

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“5, *Brunswick Place*, Sept. 19, 1842.

“Lady Marrable informs Mrs. Smith, that it is her determination to leave the house in Brunswick Place as soon as she can take another, paying a week’s rent, as all the bedrooms occupied but one are so infested with bugs that it is impossible to remain.”

On the following Thursday, the 22nd, the defendant accordingly sent the key of the house, together with the amount of a week’s rent, to the plaintiff, and removed with his family to another residence. Evidence was given to shew that the house was in fact greatly infested by bugs. The Lord Chief Baron, in summing up, stated to the jury, that in point of law every house must be taken to be let upon the implied condition that there was nothing about it so noxious as to render it uninhabitable; and that if they believed that the defendant left the plaintiff’s house on account of the nuisance occasioned by these vermin being so intolerable as to render it impossible that he could live in it with any reasonable comfort, they ought to find a verdict for the defendant. The jury having found for the defendant,

Hayward now moved for a new trial, on the ground of misdirection.—The alleged nuisance is no answer to this action, founded as it is upon a written agreement of demise for a longer period, but must, if true, be made the subject of a cross action. The rent is not in its nature divisible, and inasmuch as it cannot be said that there has been a total failure of consideration, the payment of a part of it is an admission of the tenancy. In *Salisbury v. Marshall* (a),

the defendant, who held a house under an agreement "to become tenant by occupying," was held to be entitled to shew, in answer to an action for use and occupation, that the house was not in such a reasonable and decent state of repair as to be fit for comfortable occupation: but *Tindal*, C. J., there says, "I agree with the plaintiff's counsel, that if there had been a separate agreement to do these repairs, then the not having done them would furnish no defence." In *Granger v. Collins* (a), it was held that no duty arises out of the mere relation of landlord and tenant, in the absence of any special agreement, to protect the tenant against eviction by a reversioner.

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But even if this be a defence to the action, it ought to have been pleaded specially. It cannot be denied that this agreement was at one time binding, and therefore the throwing it up for such cause is matter in confession and avoidance. *Waddilove v. Barnett* (b) is an authority in point. There a defendant, in answer to an action for use and occupation, relied upon a payment of rent made to a mortgagee in consequence of notice from him; and it was held that, so far as this defence related to rent which had accrued due previously to the notice, it was not admissible under non assumpsit, but ought to be specially pleaded. Here, in substance, the defence in truth is that there was fraud, express or implied, on the part of the plaintiff, in concealing from the defendant the fact of the existence of this nuisance.

PARKE, B.—This case involves the question whether, in point of law, a person who lets a house must be taken to let it under the implied condition that it is in a state fit for decent and comfortable habitation, and whether he is at liberty to throw it up, when he makes the discovery that it is not so. The case of *Edwards v. Etherington* (c) appears

(a) 6 M. & W. 458. (b) 2 Bing. N. C. 538; 2 Scott, 763.
(c) Ry. & M. 268; S. C., 7 D. & R. 117.

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to me to be an authority very nearly in point. There the defendant, who held a house as tenant from year to year, quitted without notice, on the ground that the walls were in so dilapidated a state that it had become unsafe to reside in it; and Lord *Tenterden*, at *Nisi Prius*, held these facts to be an answer to an action by the landlord for use and occupation: telling the jury, that although slight circumstances would not suffice, such serious reasons might exist as would justify a tenant's quitting at any time, and that it was for them to say whether, in the case before them, such serious reasons existed as would exempt the defendant from the plaintiff's demand, on the ground of his having had no beneficial use and occupation of the premises. The jury found for the defendant, and the Court of King's Bench was afterwards moved for a new trial on the ground of misdirection, but they refused to disturb the verdict. There is also another case of *Collins v. Barrow* (a), in which *Bayley*, B., held that a tenant was justified in quitting without notice premises which were noxious and unwholesome for want of proper sewerage. These authorities appear to me fully to warrant the position, that if the demised premises are incumbered with a nuisance of so serious a nature that no person can reasonably be expected to live in them, the tenant is at liberty to throw them up. This is not the case of a contract on the part of the landlord that the premises were free from this nuisance; it rather rests in an implied condition of law, that he undertakes to let them in a habitable state. With respect to the second point, if the law be as I have stated, and the existence of such a nuisance constitutes a defence to the action, I think it is a defence which is clearly admissible under non assumpsit. This is an action for use and occupation, in answer to which it is competent to the defendant to shew, under the plea of non assumpsit, that there never was any such occupation by

(a) 1 M. & Rob. 112.

him of the premises as to render him liable in point of law. Not only is this a good plea, but it seems to me that it is the only proper plea in such a case, and that a special plea embodying such a defence would be demurrable, as amounting to the general issue.

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ALDERSON, B., and GURNEY, B., concurred.

LORD ABINGER, C. B.—I am glad that authorities have been found to support the view which I took of this case at the trial, but for my own part I think no authorities were wanted, and that the case is one which common sense alone enables us to decide. A man who lets a ready-furnished house surely does so under the implied condition or obligation—call it which you will—that the house is in a fit state to be inhabited. Suppose, instead of the particular nuisance which existed in this case, the tenant discovered the fact—unknown perhaps to the landlord—that lodgers had previously quitted the house in consequence of having ascertained that a person had recently died in it of plague or scarlet fever; would not the law imply that he ought not to be compelled to stay in it? I entertain no doubt whatever on the subject, and think the defendant was fully justified in leaving these premises as he did: indeed, I only wonder that he remained so long, and gave the landlord so much opportunity of remedying the evil.

Rule refused (a).

(a) See *Izon v. Gorton*, 5 Bing. N. C. 501; 7 Scott, 537; *Arden v. Pullen*, 10 M. & W. 321.

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1843.

Jan. 18.

A person who assigns away his interest in a ship or goods, after effecting a policy of insurance upon them, and before the loss, cannot sue upon the policy; except as a trustee for the assignee, in a case where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit.

POWLES and Others *v.* INNES.

THIS was an action of assumpsit on a policy of insurance on ship. The declaration stated that the policy was made by the plaintiffs as agents for Robert Page and Robert Chamberlain; that Page and Chamberlain, and one Sarah Banks, were, during the risk and until and at the time of the loss, interested in the ship to the amount of the money insured; and that the ship was totally lost. The defendant pleaded, first, payment of 75*l.*; secondly, as to the residue, non assumpsit; thirdly, except as to 75*l.*, that although Chamberlain was interested in the ship during the risk and at the time of the loss to the amount of 400*l.*, in respect of which the plaintiffs were entitled to recover the said sum of 75*l.*, yet that, save as aforesaid, Chamberlain and Page were not interested in the ship during the risk, and that the policy was not made by the plaintiffs as agents for Sarah Banks or for her benefit, nor did she give any order for effecting the same; and fourthly, except as to 75*l.*, that although Chamberlain was interested during the risk to the amount of 400*l.*, &c., yet, save as aforesaid, Chamberlain, Page, and Banks were not interested in the ship during the risk, modo et formâ. On these pleas issues were joined.

The cause was tried before Lord *Abinger*, C. B., at the Middlesex Sittings after Trinity Term, 1840, when a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case:—

On the 22nd of January, 1838, the plaintiffs, who are insurance agents, by directions from, and on account and for the benefit of, Robert Page and Robert Chamberlain, in respect of their two-thirds of the vessel, effected a policy of insurance on the ship *Commerce*. The premiums were charged to and paid by Page and Chamberlain. The policy was subscribed by the defendant for 150*l.* At the time of

the insurance and at the time of the loss, the vessel was of the value of 1200*l*. At the time of effecting the insurance, Chamberlain, Page, and Sarah Banks were each interested in one-third of the vessel. The vessel was lost in January 1839, within the time mentioned in the policy. Before the loss, Page, by bill of sale, conveyed his share to Sarah Banks. From the time of the said bill of sale down to the time of the loss, Chamberlain and Sarah Banks were owners of the Commerce, the former of one-third and the latter of two-thirds of that ship. On the day after the sale, Sarah Banks ordered a policy for 600*l*. to be effected in respect of her two-thirds for twelve months, which was accordingly effected in the Alliance Office, and upon which she received as for a total loss.

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POWLES
v.
INNES.

The question for the opinion of the Court is, whether the verdict should be entered for the plaintiffs or for the defendant, and for what amount, if any, and upon which of the several issues joined between the parties. The pleadings are to form a part of the case, and the Court are to be at liberty to draw such conclusions as they shall think the jury ought to have drawn.

W. H. Watson, for the plaintiffs.—The question in this case is one which, although often considered, has never been expressly determined; namely, whether, where a person, being the owner of a vessel, after effecting a policy of insurance upon it, sells his interest in the vessel, by such transfer of his interest the policy is at an end. The plaintiffs contend that it is not, but that it continues in force, and the party who recovers upon it is a trustee for the purchaser. [Lord *Abinger*, C. B.—The form of declaration is, that the plaintiff was interested “during the risk and until and at the time of the loss.” Unless the policy be expressly assigned to the purchaser, why should it pass any more than any other wager on the vessel?] The policy is merely an accessory to the principal, the

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ship. [*Parke, B.*—If the policy were handed over at the time of executing the bill of sale, that would be evidence of the intention of the parties that the seller should be a trustee for the purchaser. The question really is, is it an incident to the vessel?] In *Sparkes v. Marshall (a)*, *Tindal, C. J.*, says—“If the plaintiff have an insurable interest at the time the policy was effected, whatever change may have taken place in the property since can have no effect in relieving the underwriters from their liabilities, as the plaintiff may sue on the policy for the benefit of the party to whom such property has passed.” [*Parke, B.*—In that case the plaintiff was interested both at the time of the insurance and of the loss. *Lord Abinger, C. B.*—That judgment must be taken to mean that the assignment of the goods makes no difference, provided the parties keep the contract of insurance alive for the benefit of the assignee. *Parke, B.*—The contract of insurance is a contract of indemnity.] Yes, but it is a contract to indemnify any body who may be interested in the subject-matter; it is an indemnity in respect, not of the underwriter, but of the subject-matter of insurance; and though it is necessary to allege an interest in the declaration, it is not necessary to allege it to have existed down to the time of the loss. [*Lord Abinger, C. B.*—I never saw it otherwise.] In *Perchard v. Whitmore (b)*, which was an action on a policy of insurance on goods, the declaration averred that P. M. and N. M., until and at the time of the loss, were interested in the goods, and that the insurance was made for them and on their account. It appeared on the evidence upon the voir dire of a witness called for the plaintiffs, that since the policy was effected he had become a partner with P. M. and N. M., and had taken a share of the goods insured: and upon objection that this evidence disproved the allegation of interest in the declaration,

(a) 2 Bing. N. C. 761; 3 Scott, 172.

(b) 2 Bos. & P. 155, n.

Buller, J., ruled that the plaintiff ought not to be nonsuited, for that the witness was not interested at the time of making the policy, "to which the averment of interest related, and the plaintiff brought the action for those who were interested at the time."

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1843.

POWLES
v.
INNES.

Greenwood, contra, was stopped by the Court.

LORD ABINGER, C. B.—I am clearly of opinion that the defendant is entitled to our judgment. The last authority that has been cited is a mere note of a *Nisi Prius* case, the correctness of which I greatly doubt. The contract of insurance was originally only a contract of wager, that the vessel should arrive at her destination: since the legislature has adopted it, it is a contract of indemnity only, and nobody can recover in respect of the loss who is not really interested. The policy is but a chose in action, and cannot pass merely by the assignment of the ship.

PARKE, B.—I am of the same opinion. The plaintiff can only recover an indemnity. Then what has this party lost, if he has sold his interest in the ship, irrespective of the policy? Banks's interest is not protected, because she gave no authority to effect the insurance. Unless, therefore, there was some understanding that the policy should be kept alive for her benefit, the plaintiffs, suing on behalf of Page, have lost nothing. If the policy had been handed over with the bill of sale, or there had been an order to the brokers to hand it over, the case would be different; then the parties might sue as trustees for the purchaser: but we cannot infer that, no facts being stated in the case to warrant such an inference.

GURNEY, B., concurred.

Judgment for the defendant.

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1843.

Jan. 23.

ALSAGER, Assignee of EVANS and Others, Bankrupts, v.
CURRIE and Others.

To a declaration in debt by the assignee of a bankrupt, the defendants pleaded, that before the fiat the defendants discounted a bill of exchange for the bankrupt, and then lent and advanced, and gave credit to him for a sum of money exceeding the damages in the declaration mentioned; proceeding to allege a set-off. Replication, that the defendants did not lend or advance any sum of money to the bankrupt:—*Held*, that this traverse was not too narrow, as the lending and advancing, and the giving credit, appeared to be all one transaction.

DEBT by the plaintiff as assignee, for money lent by the bankrupts, money had and received to their use, and upon an account stated with them before the bankruptcy. Plea, that before the date and issuing of the fiat, the defendants discounted a certain bill of exchange for the bankrupts, and then lent and advanced to them, and gave credit to them for a certain large sum of money, exceeding the damages in the declaration mentioned, upon the security of the said bill of exchange: proceeding to allege a set-off to that amount. Replication, that the defendants did not lend or advance a large sum of money, or any sum of money whatever, to the bankrupts.

Special demurrer, assigning for cause, that the traverse was too narrow, inasmuch as it was confined to the lending and advancing, and took no notice that the defendants gave credit to the bankrupts.—Joinder in demurrer.

J. W. Smith, in support of the demurrer.—The traverse taken in the replication is too narrow, as it takes no notice of the giving of credit to the bankrupts, whereas the giving of credit would of itself afford the defendants a good defence, and by this mode of replying they are shut out from that defence. The rule is, that a party in pleading is not entitled to leave unanswered part of an allegation, which would be a good defence: *Goram v. Sweeting* (a), *Stubbs v. Lainson* (b), *Moore v. Boulcott* (c). Suppose the plea had alleged that the defendants paid money to the use of, and had lent and advanced it to, the bankrupts; could the plaintiffs have traversed the latter branch of the averment only? So here, the plaintiff ought to have put the giving of credit in issue.

(a) 2 Saund. 206.

(b) 1 M. & W. 728.

(c) 1 Bing. N. C. 323; 1 Scott, 122.

Martin, contra, was stopped by the Court.

Arch. of Pleas,
1843.

ALSAGER
v.
CURRIE.

LORD ABINGER, C. B.—I think the replication is good. The lending and advancing, and giving credit, alleged in the plea, are all consistent with its being but one transaction. There does not appear to have been any sum for which the defendants gave credit, which was not also lent and advanced: the replication, therefore, substantially puts the whole allegation in issue. The defendants may amend on the usual terms, otherwise there will be judgment for the plaintiffs.

PARKE, B.—I am of the same opinion. If the averment in the plea were merely that the defendants gave credit to the bankrupts, without stating in what mode, it would be bad on special demurrer. But if the plea as it now stands were demurred to on that ground, the answer would be, that the mode of giving credit was alleged, viz. by lending and advancing the money. The lending and advancing, and giving credit, form but one transaction.

ALDERSON, B.—The meaning of the averment in the plea is, that the defendants lent and advanced money to the bankrupts, and upon such loan and advance gave credit. A denial of the loan and advance is a denial of the whole.

GURNEY, B., concurred.

Leave to the defendants to amend on payment of costs, otherwise

Judgment for the plaintiff.

Exch. of Pleas,
1843.

Jan. 19.

A sheriff who seizes goods under a fieri facias, and, after notice that rent is due to the landlord of the defendant, removes the goods without such rent having been first paid, is liable for such removal, on the stat. 8 Anne, c. 14, s. 1, to an action on the case at the suit of the landlord.

In such action, no averment of notice to the *execution creditor* is necessary.

Nor need it be alleged that the goods removed were goods chargeable by law with a distress.

In order to maintain the action, it must appear that the premises were held at a rent certain. And where the tenant entered into possession in January 1829, under an agreement made in October 1828,

whereby a lease was to be granted to him from the 20th November, 1828, but no lease was granted; and the tenant continued to occupy until the time of the execution, in February 1842, but no payment of rent was shewn to have been made:—*Held*, that it did not sufficiently appear that he held as tenant at a rent certain, so as to bring the case within the statute, and render the sheriff liable.

Quære, whether any action lies for the landlord against the *execution creditor*.

RISELEY v. RYLE, Esq.

CASE against the sheriff of Cheshire, on the statute 8 Anne, c. 14, s. 1. The declaration stated, that on the 25th December, 1842, and for a long space of time then last past, to wit, for the space of five years, one J. Knott and one W. Knott occupied a certain brewery, dwelling-house, and appurtenances, as tenants thereof to the plaintiff, at a certain rent theretofore payable by the said J. Knott and W. Knott to the plaintiff for the same. Averment, that the sum of 250*l.*, for one year's rent ending on the day and year aforesaid, was due and in arrear, and that the defendant, being sheriff of the county of Chester, by virtue of a writ of fi. fa. issued against the said J. Knott and W. Knott, together with one C. Knott, at the suit of one John Jackson, directed to the sheriff of Cheshire, took certain goods and chattels then lying and being in and upon the said brewery, dwelling-house, and appurtenances, so then being as aforesaid in the tenure and occupation of the said J. Knott and W. Knott as tenants thereof to the plaintiff (a), of great value, &c. The declaration then averred notice to the sheriff, before the removal of the goods, of the rent being due to the plaintiff, and request of payment thereof, and alleged as a breach, that the defendant wrongfully carried away the goods, without paying or satisfying the plaintiff the said arrears of rent, &c. &c.

Pleas, first, that the said J. Knott and W. Knott did not hold, use, occupy, or enjoy the premises in the declaration mentioned, or any or either of them, or any part thereof, as

(a) See *Riseley v. Ryle*, ante, p. 101.

tenants thereof to the plaintiff, in manner and form &c.; secondly, that the defendant did not, during the continuance of the said tenancy, take any goods or chattels, in manner and form &c.: upon which issues were joined.

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1843.

RISLEY
v.
RYLE.

At the trial before *Gurney, B.*, at the last Chester Assizes, it appeared that Messrs. J. & W. Knott took the premises in question from one William Beard, deceased, (whose heiress at law the plaintiff's wife was proved to be) by an agreement dated the 22nd October, 1828; whereby W. Beard, in consideration of the rent, covenants, and agreements thereafter mentioned, did promise and agree with the said J. Knott & W. Knott, their executors, &c., that he the said W. Beard, his heirs or assigns, should and would, on or before *the 20th day of November then next*, at the costs of the said J. Knott & W. Knott, grant and execute unto them, their executors, &c., and they the said J. Knott & W. Knott did thereby consent and agree to accept and take, a good and effectual demise or lease, to be prepared by the solicitor of the said J. Knott & W. Knott, of the premises in question,—describing them as a brewery situate in Portwood, in the parish of Stockport, with the plant, utensils, fixtures, articles, and things therein mentioned in the schedule thereunder written, and also a dwelling-house attached thereto, and the yards, stabling, &c., and other appurtenances to the same belonging, and especially the use of the steam and steam-engine erected and being in the cotton-factory of the said William Beard, on the east side of and adjoining the said brewery and premises; to hold the same to the said J. Knott & W. Knott, their executors, &c., for the term of fourteen years, to be computed from the 25th day of October then next, at the yearly rent of 250*l.*, payable as therein mentioned. The agreement then provided for the insertion in the intended lease of various covenants and provisoes, and also contained a stipulation that it should and might be lawful for the said J. Knott & W. Knott, their executors,

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 v.
 RYLE.
 at the price of 6000*l.*, all the premises thereby agreed to be demised, and also the adjoining premises used as a cotton-factory.

Messrs. Knott entered into possession of the brewery &c. under this agreement, in January 1829, but no lease was ever executed to them, and they continued in occupation of the premises until the period of the execution out of which this action arose, in February 1841, carrying on the business of the brewery, and living in the dwelling-house attached thereto. The plaintiff did not prove payment by them of any rent. It was contended for the defendant, that the plaintiff ought to be nonsuited, for that no subsisting tenancy was shewn such as to warrant a distress, without which the stat. 8 Anne, c. 14, s. 1, did not apply. The learned Judge thought there was evidence of a tenancy to go to the jury; and a verdict passed for the plaintiff, damages 250*l.*

In Michaelmas Term (November 4), *Jervis* moved for a rule to shew cause why the verdict should not be set aside and a new trial had on the ground of misdirection, or why the judgment should not be arrested. First, this was not a case to which the remedy given by the statute of Anne is applicable. That statute merely comes in aid of a landlord who would have at common law a right to distrain. The words of the statute are, "that no goods or chattels whatever, lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the said premises by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of taking such goods or

chattels by virtue of such execution: provided the said arrears of rent do not amount to more than one year's rent," &c. This clause clearly contemplates a tenancy at a rent certain, in respect of which a distress could be made: *Hodgson v. Gascoigne* (a). But this is not a case in which such a tenancy could be implied. This was an agreement made in contemplation of a future lease, under which the parties were tenants at will merely, *Chapman v. Towner* (b), *Regnart v. Porter* (c), and until payment of rent, of which there was no proof, no right of distress would exist, but only an action for use and occupation. Besides, the agreement stipulates for the demise not only of the brewery, &c., but also for the use of steam power from the adjoining factory; and there was no evidence that this had been enjoyed by the Messrs. Knott (d).

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Secondly, the judgment ought to be arrested, on the ground that the statute gives no action against *the sheriff*, but only against the *execution creditor*; the words being, that no goods &c. shall be liable to be taken &c., unless "*the party at whose suit the execution is sued out*" shall before their removal pay the landlord his rent. The statute, therefore, does not require the sheriff to pay over the rent, but makes the original taking a trespass if the execution creditor do not pay it over before removal of the goods. Now, this action is not for the *taking*, but for the *removal* without payment of the rent. It was undoubtedly held in *Palgrave v. Windham* (e), that the action lay against the sheriff for the tort in removing the goods *after notice* of the rent being due, but it appears to have been thought that there should be notice to the execution plaintiff. [*Parke, B.*—The provision of the statute is, that the sheriff shall not *take* the goods unless the landlord's rent be paid before their *removal*, that is, shall not remove them unless the rent

(a) 5 B. & Ald. 88.

(b) 6 M. & W. 100.

(c) 7 Bing. 451; 5 M. & P. 370.

(d) This point was not made at the trial.

(e) 1 Stra. 212.

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be first paid. That may well be translated as directing that the sheriff shall pay the rent to the landlord before the removal of the goods, or else shall be liable for damages.] In *Wintle v. Freeman* (a), *Patteson*, J., remarks that "it is singular that an action should be brought against the sheriff for a false return of nulla bona where rent has absorbed the levy, because the statute of Anne enacts in substance that, on seizure and notice of rent being due, the person suing out the writ shall pay the landlord all the rent due to him, and the sheriff is then to levy both the rent and the execution money." [Lord *Abinger*, C. B.—The execution creditor has nothing to do with the seizure: the sheriff is the person who is prohibited from removing the goods until the rent is paid.] Money had and received will not lie against the sheriff after the sale of the goods, although it will against the execution creditor. In *Ryan v. Daly* (b), the Court of Exchequer in Ireland held expressly that debt lies on the stat. 9 Anne, c. 8 (the corresponding Irish act) by a landlord against the plaintiff in a civil bill decree, for taking in execution and removing goods off the demised premises, without satisfying an arrear of rent then due. There ought at all events to be an allegation of notice to the execution creditor. [*Parke*, B.—Express notice to the sheriff has been held not to be necessary; it is sufficient if he sells without retaining the rent, with knowledge that it is due: *Andrews v. Dixon* (c). Construing the act as it has hitherto been construed, it means, that the sheriff is not to remove the goods unless the rent has first been paid by somebody; if he does, he is liable to an action at the suit of the landlord, for whose benefit the act of Parliament was made.]

But further, the action does not lie for the *removal*; the act forbidden is the *taking* under the circumstances men-

(a) 11 Ad. & E. 593; 1 G. & D. 93.

(b) Jones's Reports, (Irish), vol. 2, p. 299. (c) 3 B. & Ald. 645.

tioned in the statute. [Parke, B.—It is clear the statute does not mean the original taking, but that there shall not be a substantial taking for the satisfaction of the debt, that is, by the removal and sale of the goods, without payment of the rent.]

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v.
RYLE.

Lastly, it was alleged in *Ryan v. Daly*, that the goods taken were by law chargeable with a distress for rent; there is no such allegation here. [Parke, B.—The words of the statute are “no goods or chattels whatsoever.”] That must mean such as are distrainable. It may be said all goods on the premises are *prima facie* distrainable, and therefore that the defendant should state that the particular goods were not so; but he cannot do so, because there is no allegation in the declaration to which such a traverse can be applied.

LORD ABINGER, C. B.—The rule will go on the first point only. With respect to the other, we think there should be no rule, notwithstanding the dicta thrown out in the case of *Ryan v. Daly*. We do not mean, however, to say anything against the authority of that case, which decides no more than that an action of debt is maintainable against the execution plaintiff. The statute has had a construction put upon it by the cases and the uniform practice, and we should be unwilling to throw a doubt upon it by granting a rule in this case.

PARKE, B.—The observation of my brother *Patteson*, in *Wintle v. Freeman*, amounts to no more than a very slight intimation of doubt. The constant practice, since the case of *Palgrave v. Windham*, has been to bring the action against the sheriff. The true construction of the statute, or at least one that it will well bear, is, that a duty is cast by it upon the sheriff to take care that the goods are not removed, he having notice that rent is due, until the rent

Exch. of Pleas, has been paid. The words of the statute are “no goods or chattels whatsoever,” and I am not aware that it has ever been decided to be confined to goods and chattels which are distrainable in point of law, though it has been decided that it must appear that a rent certain was due.

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A rule was accordingly granted on the first point only ; against which

Evans and *Welsby* now shewed cause.—The issue in this case on the first plea is merely whether, at the time of the execution, the Knotts were tenants to the plaintiff as alleged in the declaration. It is said that it must appear to have been such a tenancy as that a power of distress existed ; but nothing of the kind appears in the statute. The words of the first section are “any messuages, lands, or tenements, which are or shall be leased for life or lives, term of years, *at will or otherwise ;*” and it is observable that the second section, which applies to the fraudulent removal of goods by the tenant, uses different words,—“any messuages, lands, or tenements, *upon the demise whereof any rents are or shall be received or made payable.*” Now, it is conceded that, under this agreement, the Messrs. Knott became at all events tenants at will until the execution of a lease. But supposing it to be necessary, in order to bring the case within the operation of the statute, that there should appear to be a demise at a rent certain, there was in this case evidence to go to the jury that they had become tenants from year to year, on the terms of the intended lease. Here they had come in under the agreement, and had actually occupied under it for nearly the whole term of 14 years for which the lease was to run : and further, they began to occupy at a period subsequent to that at which the lease was to commence, so that they may be considered as standing in a similar situation to

that of a tenant who continues to occupy after the expiration of a lease. It is true no evidence was given of the actual payment of rent; but such payment is only one species of evidence of a contract to occupy as tenants from year to year: *Knight v. Bennett* (a), *Cox v. Bent* (b). In the latter case, where the plaintiff had entered on premises under an agreement for a lease, the mere admission by him of a charge of half a year's rent in an account between him and his landlord, was held sufficient to constitute him tenant from year to year. [Parke, B.—In *Hegan v. Johnson* (c), the principle laid down appears to be, that where, under an agreement for a lease at a certain rent, the tenant is let into possession before a lease executed, the lessor cannot during the first year distrain for rent.] It is laid down in *Harrison v. Barry* (d), that in this action it is not necessary to prove a year's rent due, but that it is sufficient to prove the occupation by the tenant, and it lies on the defendant to shew that the rent has been paid.

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Jervis and *E. V. Williams*, contra.—The tenancy to which the statute applies must be a tenancy to which a right of distress is incident. If the landlord has no power of distress, there is nothing from which he has to be protected. *Calvert v. Jolliffe* (e) shews that this is an action for damages; but what damages can there be, if the landlord had no power of distress on the goods? But if a tenancy at will be within the statute, it must be at a rent certain. But where a party enters into occupation under a mere agreement for a lease, how is rent to be computed? He is merely subject to an action for use and occupation; *Doe d. Tomes v. Chamberlain* (f). All that is meant by the case of *Harrison v. Barry* is that the mere effluxion of

(a) 3 Bing. 361; 11 Moore, 227.

(b) 5 Bing. 185; 2 M. & P. 281.

(c) 2 Taunt. 148.

(d) 7 Price, 690.

(e) 2 B. & Adol. 418.

(f) 5 M. & W. 14.

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time *prima facie* shews the rent to be due. All that can be said in this case is, that because more than a year has elapsed, there is evidence of a tenancy at a rent certain; but that is not so. In *Chapman v. Towner*, it is said generally, that a party who enters under an agreement for a lease is only tenant at will until he pays rent, and then becomes tenant from year to year. *Mann v. Lovejoy* (a) is to the same effect. In *Regnart v. Porter*, the tenant had occupied for nearly four years. The settlement of an account containing a claim for rent, as in *Cox v. Bent*, is equivalent to actual payment of it. In *Hegan v. Johnson*, the question arose within the first year, and all that it was necessary to decide was, that until that had elapsed, at all events, no implication of a tenancy from year to year could be made.

But further, there was in this case no proof of an enjoyment commensurate with the rent which was to be reserved by the lease. That rent was to be paid not only for the occupation of the premises, but also for the use of the steam power; and there was no evidence that the latter had been enjoyed.

Lord ABINGER, C. B.—I think the rule must be made absolute to enter a nonsuit. Even if the plaintiff had proved a demise at a rent certain, which is necessary to satisfy the terms of the statute, he could not be entitled to succeed, unless he shewed an enjoyment of the same subject-matter in respect of which the rent was to be reserved; because without that he would not shew that any rent was due. Where the tenant occupies under an agreement, it must appear that possession is had of the same subject-matter which is included in the agreement, otherwise it is not a case in which the sheriff is bound to pay over the

(a) Ry. & M. 355.

rent to the landlord. If, indeed, the plaintiff, having proved occupation for so long a period, had gone on to prove a payment of a rent certain, from which a tenancy from year to year might have been inferred, the case would have been different; but in the absence of any such evidence, I think he has not made out a sufficient case to bring the sheriff under the liability cast upon him by the statute, and therefore that there must be a nonsuit entered.

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PARKE, B.—I also think that, upon the whole, there was not sufficient evidence on which to direct the jury to find for the plaintiff. In all the cases, there has been proof either of actual payment of rent, or of something equivalent to payment, from which a tenancy from year to year at a rent certain might be inferred. Here there is nothing more than the bare fact of occupation for a certain number of years, even supposing that occupation to have been of the same subject-matter in respect of which the rent was to have been reserved. I think, therefore, that the learned Judge ought to have directed a nonsuit.

GURNEY, B., concurred.

Rule absolute to enter a nonsuit.

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Jan. 16.

To a declaration in assumpsit on several bills of exchange, for goods sold and delivered, &c., the defendant pleaded a release by deed, making profert. The replication set out the deed on oyer, from which it appeared that the plaintiffs and others, creditors of the defendant, agreed to release the defendant from their claims, on his agreeing to pay them a composition of 11s. in the pound thereon, and giving certain promissory notes for the amount; with a proviso, that in case default should be made in payment of any of the notes when due, the agreement and release should be void. The replication then averred, that default was made in payment of one of the notes, and that the same was renewed by another, which was dishonoured when due.

Rejoinder, that, before such default, the defendant delivered to the plaintiffs another promissory note, which was accepted by them in lieu and satisfaction of the said first note:—*Held*, that the rejoinder was bad, as being a departure from the plea.

ASSUMPSIT.—The first five counts of the declaration were on bills of exchange, respectively dated 2nd March, 1st of April, 1st of May, 1st of June, and 1st of July, 1840. The sixth was on a promissory note, dated 21st of January, 1841. There were also counts for goods sold and delivered, money paid, interest, and on an account stated.

Pleas.—First, as to all the declaration except the sixth count, that after the accrual of the causes of action in the declaration mentioned, and each and every of them, (except as aforesaid), and before the commencement of this suit, to wit, on the 25th day of July, A. D. 1840, by a certain indenture then made by and between the defendant of the one part, and the plaintiffs and divers other persons, then being creditors of the defendant, whose names were and are to the said indenture subscribed, and seals thereto affixed, of the other part, [profert], they, the plaintiffs, did release to the defendants all and every the debts and causes of action in the declaration mentioned, except as before excepted. Verification.

Second, as to the sixth count, a payment of money into Court, and no damages ultra.

The replication to the first plea set out the deed on oyer, executed by the defendant of the one part, and the plaintiffs and others, creditors of the defendant, of the other part; and thereby “the defendant did, for himself, his executors, and administrators, covenant, promise, and agree with and to the said several persons, parties thereto of the second part, that he the said Edmund Boyle (the defendant) should and would well and punctually pay or cause to be paid to them, the said several persons, parties thereto of

the second part, their executors, administrators, or assigns respectively, the sum of 11*s.* in the pound on the amount of the debts due to (and set and affixed opposite to the names of) the same persons respectively, and at the times and in manner following, that is to say, the sum of 2*s.* 9*d.* in the pound on the amount of the said debts by the promissory notes of the said E. B. payable at three months from the day of the date of those presents, the like sum of 2*s.* 9*d.* in the pound on the amount of the said debts by the promissory notes of the said E. B. at six months from the date of those presents, and the sum of 5*s.* 6*d.* in the pound on the amount of the said debts by two equal instalments of 2*s.* 9*d.* in the pound, to be secured by the joint and several promissory notes of the said E. B. and Thomas Pocock, as aforesaid, payable at nine and twelve months from the day of the date of those presents, to the said persons, parties thereto, and their partners respectively, or to their order, in the proportions and at the dates aforesaid, and which said promissory notes for the sum of 11*s.* in the pound, were paid to the said several persons, parties thereto of the second part, at the time of their severally sealing and delivering those presents, in full satisfaction and discharge of the said debts so due to them the said persons respectively from the said E. B. as aforesaid; and that he the said E. B., at the time of the giving of the said promissory notes as aforesaid, should pay the expenses incurred in and about the investigation of the affairs of the said E. B. and in and about carrying that arrangement into effect. And in consideration of the said covenant of the said E. B., and of the said promissory notes made and given by him to the said several creditors, parties thereto of the second part, (the receipt of which promissory notes, and that the same were received and taken in full payment, satisfaction, and discharge of the said debts due from the said E. B. to them, the said several creditors, parties thereto of the second part, they, the said several persons, parties

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thereto of the second part, did thereby for themselves severally and for their respective executors, administrators, partners and assigns, admit and acknowledge, subject to the proviso hereinafter contained), they the said several persons, parties thereto of the second part, did thereby for themselves severally, and for their respective executors, administrators, partners and assigns, remise, release, and for ever quit claim and discharge the said E. B., his heirs, executors, administrators, and assigns, and his and their lands, tenements, goods, chattels, estate and effects of and from the said debts or sums of money so due to them, the said persons, parties thereto of the second part, and affixed opposite to their respective names as aforesaid, and all actions, suits, claims and demands whatsoever, in respect of or in any way relating to the same, save and except the said promissory notes so given as aforesaid: provided always, that in case default were made in payment of any or either of the said promissory notes, as and when they respectively became due and payable, the agreement thereinbefore contained, for accepting 11*s.* in the pound, and the release thereby given, should be void; and that the said original debts should become due and payable, as if such composition of 11*s.* in the pound had not been offered." The replication then averred, that the several debts and sums of money in the declaration mentioned, except in the sixth count thereof, became and were due and payable from the defendant to the plaintiffs, and the said causes of action in respect thereof arose and accrued to the said plaintiffs, before and at the time of making the said indenture, and then remained and continued unpaid; and further, that the defendant afterwards, to wit, on the said 25th day of July, A. D. 1840, in pursuance of the said indenture, and at the time of making, sealing, and delivering the same, in payment of the said composition by the instalments and at the times and in manner in the indenture mentioned, did make and deliver to the plaintiffs certain his promissory notes, being four

in number, for the respective amounts of the said instalments, payable to the plaintiffs as the payees of the said promissory notes, according to the terms of and in the manner and form in the said indenture mentioned, two of the said notes being the notes of the defendant only, and the other two notes being the joint and several notes of the defendant, and of the said Thomas Pocock; and further, that amongst the said promissory notes so made by the defendant and delivered to the plaintiffs as aforesaid, there was a certain promissory note made by the defendant in writing, bearing date, to wit, on the said 25th day of July, A. D. 1840, and being one of the said two notes first above mentioned, and thereby the defendant promised to pay to the plaintiffs 69*l.* 17*s.* 11*d.* six months after the date thereof, and then delivered the same to the said plaintiffs in payment of part, to wit, the sum of 69*l.* 17*s.* 11*d.* of the said composition so covenanted to be paid by the defendant to the plaintiffs as aforesaid, being the second instalment thereof; and that before and at the time when the said last-mentioned promissory note was about to become due and payable, according to the tenor and effect thereof, to wit, on the 21st day of January, A.D. 1841, the same was in the hands and possession of certain persons whose names are unknown to the plaintiffs, and that the defendant not being then able to provide for, or to pay or to take up the same, the said plaintiffs afterwards, to wit, on the day and year last aforesaid, at the request of the defendant, and by and through the defendant as their agent in that behalf, but with their own proper monies, took up and discharged, and paid to the said persons whose names are so unknown to the plaintiffs, the amount of the said note; and that thereupon, to wit, on the day and year last aforesaid, they the said plaintiffs, at the request of the defendant, took and received of and from the defendant a certain other promissory note then made and drawn by the defendant, and bearing date,

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to wit, the day and year last aforesaid, whereby the defendant promised to pay to the plaintiffs 69*l.* 17*s.* 11*d.* twelve months after the date thereof, which period had elapsed long before the commencement of this suit, and the defendant then delivered the said last-mentioned note to the plaintiffs in renewal of the said note so by them the said plaintiffs taken up and paid, and discharged as aforesaid; and the plaintiffs aver, that, at the time when the last-mentioned note became due and payable according to the tenor and effect thereof, the same was dishonoured by the said defendant by nonpayment thereof, and was not paid when due. Verification.

Rejoinder.—That after the making by the said defendant and the delivering to the plaintiffs of the promissory note in the replication mentioned, to wit, the said note bearing date the 25th July, A. D. 1840, and before the same became due and payable according to the tenor and effect thereof, and before any default had been made in payment thereof according to the tenor and effect of the said indenture, and of the said proviso therein contained, to wit, on the 21st day of January, A. D. 1841, he the defendant, in lieu and satisfaction of his said promissory note, in the introductory part of this pleading and in the said replication of the plaintiffs respectively mentioned, delivered to the plaintiffs a certain promissory note in writing signed by the defendant and one Thomas Pocock, bearing date a certain day and year therein mentioned, to wit, the day and year last aforesaid, whereby the defendant and the said Thomas Pocock jointly and severally promised to pay to the plaintiffs or their order a certain large sum of money, to wit, 69*l.* 17*s.* 11*d.*, twelve months after the date thereof, which said last-mentioned promissory note the plaintiffs then accepted and received from the defendant, in such lieu and satisfaction accordingly; and the defendant further says, that the last-mentioned promissory note is the identical promissory note in the said replication mentioned, and

which the said plaintiffs in their said replication to the first plea of the defendant allege to have been delivered to them in renewal of the said note in the replication alleged to have been taken up and paid and discharged, as is therein mentioned: without this, that the defendant delivered the said note (in the said replication of the plaintiffs mentioned) to the plaintiffs in renewal of the said note so by them, the said plaintiffs, alleged to have been taken up and paid and discharged, in manner and form as in the said replication in that behalf alleged:—concluding to the country.

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Special demurrer, and joinder in demurrer.

Humfrey, in support of the demurrer.—The rejoinder is bad, as being inconsistent with and a departure from the plea. The plea sets up an absolute release, whereas the deed, when set out on oyer, turns out to be altogether conditional; and the replication avers the non-performance of the condition. Then the rejoinder admits that, but sets up a new agreement, whereby it is alleged that the plaintiffs have precluded themselves from taking advantage of such non-performance. That is clearly inconsistent with the plea. The defence might have been available, if the plea had set out all the facts, not by way of release, but as accord and satisfaction.

Petersdorff, contra.—The plaintiff ought to have demurred to the plea, when he found that the deed, as set out on oyer, was conditional. [*Parke*, B.—Could he have done so? The deed is an absolute release, subject indeed to a defeasance, which must be shewn by the plaintiff.] That the replication professes to do; then the rejoinder shews that the defendant *has* fulfilled the condition, and that there never has been any default within the terms of the proviso in the deed. [*Parke*, B.—No; it sets up a new species of defence, by way of accord and satisfaction.] It is submitted, that in substance it is a denial of the breach stated

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But further, no sufficient breach of the terms of the proviso is shewn on the face of the replication. It does not appear that the first note was dishonoured; it is therefore consistent with all that is stated, that the second was given in satisfaction of it. [*Parke, B.*—Supposing one to have been given in substitution of the other, could the defendant have the benefit of the release, which stipulates for the payment of the notes when due, which must mean payment in cash? If the facts constitute a defence, they should have been fully pleaded in the first instance, because the defence is founded upon a fresh agreement, made at the time when the first note became due. *Alderson, B.*—The substance of the allegations is, that before the original note became due, another was given in substitution of it, which was dishonoured, and after such dishonour the action was brought. The defendant, under those circumstances, cannot resort to the release, which provides for payment of the notes in money. *Parke, B.*—He cannot stand on the original release, because it provides for payment in cash; nor on the new agreement, because it must be understood to be subject to a similar proviso, that the substituted note should be paid when due, whereas it was dishonoured.]

PER CURIAM (a),

Judgment for the plaintiffs.

(a) Lord Abinger, C. B., *Parke, B., Alderson, B., and Gurney, B.*

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Jan. 25.

CASE for an injury to the plaintiff's reversion in certain closes or parcels of land in the occupation of one Gill, as tenant thereof to the plaintiff; alleging, that without the leave or license of the plaintiff, the defendants dug and excavated divers holes and pits, and erected and fixed divers engines, gins, buildings, and posts on the said closes and parcels of land, and dug, worked, and won therein divers large quantities of coal, and carried away and converted the same, and also prostrated, subverted, and injured the crops, fences, earth, and soil of the said closes or parcels of land, and cut down certain trees growing on the same, and undermined a portion thereof, &c.

The right to a given substratum of coal lying under a certain close, is a right to land, and cannot be claimed by prescription. Aliter, of a right to take coal in another man's land.

Second plea, as to the cutting, digging, excavating, and making the holes, pits, and trenches in the declaration mentioned, and erecting and fixing the engines, gins, buildings, and posts in the declaration mentioned in and upon the said closes and parcels of land, and digging, working, and winning the quantities of coal in the declaration mentioned, and drawing, carrying away, converting, and disposing of the same to their the defendants' own use, and prostrating, subverting, and injuring the crops, fences, and earth and soil in the declaration mentioned, and undermining a portion of the same closes and parcels of land in the declaration mentioned; that John Proud deceased, and all his ancestors, whose heir he was, from time whereof the memory of man is not to the contrary until the time of making the indenture hereinafter mentioned, have had, and have been used and accustomed to have, and of right ought to have had, for himself and themselves, all the coals and veins of coal in and under the said closes and parcels of land in which &c., and full and free liberty at all times of the year to enter into and upon the said closes and parcels of land in which &c., and to cut, dig into, and

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excavate the same for the purpose of searching for, mining, and winning the coals in and under the same, and to make adits, shafts, and entrances into the mines of coal and veins of coal in and under the said closes and parcels of land in which, &c., and to do all necessary acts therein and thereon for the purpose aforesaid. The plea then alleged, that by deeds of lease and release, dated the 2nd and 3rd of September, 1841, the said John Proud bargained and sold the said coal, mines of coal, veins of coal, and premises to one William Richardson, and the defendants then justified the trespasses as the servants of Richardson.

The third plea was framed upon the stat. 2 & 3 Will. 4, c. 71, s. 2, and alleged, that for the full period of thirty years next before the commencement of this suit, the said John Proud, deceased, and his ancestors, whose heir he was, and the said William Richardson, that is to say, the said John Proud and his ancestors, whose heir he was, before and up to the time of making the indenture first hereinafter mentioned, and the said William Richardson from the time of making the same indenture, have actually taken and enjoyed, as of right and without interruption, all the coals and veins of coal, and mines of coal, in and under the said closes and parcels of land, and have during all that time, as of right and without interruption, at all times of the year, entered into and upon the said closes and parcels of land in which &c., and then cut, dug into, and excavated the same for the purpose of searching for, mining, and winning the coals in and under the same, and made adits, shafts, and entrances into the said mines of coal and veins of coal in and under the same closes and parcels of land, and done all necessary acts therein and thereon for the purpose aforesaid, &c. &c.

Special demurrer to each of these pleas, and joinder in demurrer.

The points marked for argument in the margin were as follows :—As to the second plea ; that all the coals, veins

of coal, and mines of coal in and under the said closes in which &c., and full and free liberty to enter upon the said closes in which &c., to dig, &c., the same, as claimed by the defendants, are corporeal hereditaments, a title to which cannot be made by prescription. As to the third plea; that the defendants claim a corporeal hereditament, and that to such a claim the stat. 2 & 3 Will. 4, c. 71, does not apply.

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W. H. Watson, in support of the demurrer.—These pleas are clearly bad, for no right, whether prescriptive or by force of the stat. 2 & 3 Will. 4, c. 71, can be claimed in other than incorporeal hereditaments. [*Parke*, B.—No doubt, you can only prescribe for what lies in grant.] In 2 Bl. Comm. 264, it is said—"Secondly, as to the several species of things which may or may not be prescribed for, we may in the first place observe, that nothing but incorporeal hereditaments can be claimed by prescription, as a right of way, a common, &c.; but that no prescription can give a title to lands and other corporeal substances, of which more certain evidence may be had." So, in Roll. Abr., Prescription, (B.), it is said—"No title to land can be claimed by prescription." This position being therefore assumed as indisputable, the only question in the present case is, whether the right here claimed is more than a mere incorporeal hereditament. Undoubtedly, a mere license to get coal, which does not oust the grantor of his own right to dig for coal in the same land, is a mere incorporeal right, and lies in grant; *Earl of Huntingdon and Lord Mountjoye's case* (a), *Doe d. Hanley v. Wood* (b), *Chetham v. Williamson* (c). But a mine or vein of coal, which the pleas here state Richardson, and those through whom he claims, to have been entitled to, is part and parcel of

(a) 4 Leon. 147.

(b) 2 B. & Ald. 724.

(c) 4 East, 469.

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the inheritance, and is a matter whereof a person is seised in fee, and it lies in livery and not in grant. [*Parke, B.*—It would be a matter of some difficulty to make livery of seisin of a stratum of coal lying under the soil.] A communication might be made by digging down to it. [*Alderson, B.*—Possibly a symbolical delivery on the surface of the land might be sufficient.] A party entitled to a vein or seam of coal is always alleged in pleading to be seised in fee of the coal: see *Bourne v. Taylor* (a), and *Dand v. Kingscote* (b). In *Stoughton v. Leigh* (c), it was held that a grant which authorized the grantee to take the whole stratum of a mine was a grant of a real hereditament in fee-simple, whereof the wife was dowable. Lord *Mansfield* there says, "The grant of the stratum might be taken to be a grant in fee-simple. In the course of the discussion, I was strongly struck with the argument used for the heir, that Lord *Coke* has, in 1st Inst. 32, enumerated all the species of inheritance of which a woman shall be endowed, and I thought it extraordinary that no mention should be made of mines. But upon referring to the passage, it appears to be no enumeration of all the things whereof a woman shall be endowed; nothing like it; in the thirty-sixth section, upon which this is a commentary, Littleton says, the wife shall be endowed of all *lands and tenements* of which her husband was seised. Lord *Coke* says not a word to explain what is land or what is a tenement, thinking the import of those terms well known in the law." Trespass, or ejectment, will lie for a mine, although another has the surface. *Andrews v. Whittingham* (d), *Commyn v. Kincto* (e), *Harebottle v. Placock* (f). In *Lewis v. Branthwaite* (g), it was held that the possession of a mine is in

(a) 10 East, 189.

(b) 6 M. & W. 174.

(c) 1 Taunt. 402.

(d) Carth. 277.

(e) Cro. Jac. 150.

(f) Id. 21.

(g) 2 B. & Adol. 437.

the copyholder, and not in the lord, and that the copyholder might therefore maintain trespass for an entry upon it.

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Martin, contra.—A transfer of an unopened mine of coal lies in grant and not in livery. The rule cited from 2 Bla. Comm. 264, is not borne out by the authorities referred to, to the extent there laid down. The authorities there mentioned, viz. Doctor and Student, Dial. 1, c. 8, and Finch, 132, only say, "that no prescription maketh a right in lands." The doctrine of prescription is founded on analogy to the stat. of Westminster 1, 3 Edw. 1, c. 39, whereby the time of limitation on writs of right was made to begin from the period of the return of Richard I. from the Holy Land, A. D. 1198. But until the stat. 32 Hen. 8, c. 2, land as well as incorporeal rights might be claimed by prescription. That statute enacted, "that no manner of persons should from thenceforth sue, have, or maintain any writ of right, or make any prescription, title, or claim of, to, or for any manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies, or other hereditaments of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his or their ancestor or predecessor, but only within three-score years next before the teste of the same writ, or next before the said prescription, title, or claim, so thereafter to be sued, commenced, brought, made, or had." Before the term of sixty years was fixed by this statute, the law of England was, that all evidence of title was lost in remote antiquity, and the only period of limitation upon the recovery in a real action was that beyond which it was supposed that "the memory of man was not to the contrary," viz. the reign of Richard I.: see Litt. s. 170. The reason why a man cannot prescribe for corporeal hereditaments is stated in *Paramour v. Yardley* (a), viz. because he

(a) Plowd. 545 a.

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has a better title to them, by possession and visible enjoyment. That is a reason which is applicable only to the *surface*: but a right to minerals which may or may not exist under the soil, is a right which lies in grant. It would be difficult, nay in many cases impossible, to give livery of seisin of a stratum of coal. As the right to mines has always existed, as distinguished from the right to the surface of the land, the conveyance of them must have been by grant, for livery of seisin is wholly inapplicable to them, at least in the case of unopened mines. In *Shep. Touch.* 96, (7th edit.), it is said,—“By the grant of *mineras*, or *fodinas plumbi*, &c. or mines of lead, the land itself will pass, if livery of seisin be made thereof; but otherwise it seems not, and then the grantee hath by the grant a power to dig only granted to him.” Upon which, Mr. Preston remarks, “A mine *may be* a corporeal hereditament; for instance, *if a mine be open*, and granted, the grant is of a corporeal hereditament. In regard to mines not open at the date of the grant, this distinction (a distinction founded on principle), though no decision is found on the point, may be taken. The grantee has an incorporeal and not a corporeal hereditament; *Doe v. Wood* (a); an interest which would pass by grant without livery of seisin,” &c. And the author proceeds to explain how ejectment lies for a mine which is open, and held under a right of mining. Ejectment, however, will lie for tithes, which are an incorporeal hereditament. *The Case of Mines* (b) is also an authority to shew that the right to minerals is one that lies in grant. See also *Burton’s Law of Real Property*, p. 361. An unopened mine may be likened to the case of a grant of treasure trove, which may be claimed by prescription: *Co. Lit.* 114.b., e.; *Com. Dig.* Prescription, (C). In *Seaman v. Vawdrey* (c), the question was, whether a purchaser was entitled to compensation for a

(a) 2 B. & Ald. 724.

(b) Plowd. 322.

(c) 16 Ves. 390.

right to salt-mines under the land, alleged to exist in certain persons, but which had not been exercised for a hundred years; and it was held that, notwithstanding the non-user, he was entitled to compensation, no *adverse possession* being alleged. [*Parke, B.*—It is not the right of getting the coal which is claimed here, but the right to the stratum of coal.] Why should not a man claim *timber* upon another man's land by prescription? Whether corporeal or not, it is equally a right in fee-simple: *Stanley v. White (a)*. In *Stoughton v. Leigh*, the judgment expressly makes a distinction between opened and unopened mines. In *Lord Mountjoye's case*, the right claimed was only a right of getting the coals in common with the owner of the land, and not an exclusive right.

But even if the Court should be of opinion that an unopened mine is not per se the subject of a claim by prescription, still these pleas are good, because they claim not the mines merely, but also the right of making shafts and adits, and erecting engines on the surface of the soil: and then, a part of the right being claimable by prescription, the pleas may set up a prescription for the whole. [*Lord Abinger, C. B.*—Suppose the right to the mines were granted, without the right to enter upon the land.] The grantee of the coals would be entitled to an incidental right to enter and get them. *Earl of Cardigan v. Armitage (b)*. If a portion of an entire right must be claimed by prescription, there is no authority that a man may not prescribe for the whole of that entire right.

LORD ABINGER, C. B.—I think this is clearly a prescription to land. A vein of coal is land, unless distinguished from the land by the deed of conveyance. I have little doubt that if *Mr. Martin* were to search the Year Books, he would find cases to shew that such a claim is contrary

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(a) 14 East, 332.

(b) 3 B. & Cr. 197; 3 D. & R. 414.

Exch. of Pleas, to law. The defendants may amend on payment of 1843. costs.

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PARKE, B.—This is not a claim of a prescriptive right to take coal in the plaintiff's close, but a prescription for all the strata and seams of coal lying under it, that is, for a part of the soil itself, and not for the right to get the coal, which would be the subject of a grant. Possibly the defendants may be able to amend, by pleading a seisin in fee in the strata of coal, or by prescribing for the right to take coals in the plaintiff's close. With respect to the last argument urged on behalf of the defendants, according to that a man might set up a prescriptive right to a farm and lands, together with a right of way over an adjoining close.

ALDERSON, B., and GURNEY, B., concurred.

Leave to the defendants to amend on payment of costs, otherwise

Judgment for the plaintiff.

Jan. 25.

LEDGARD and Another v. THOMPSON.

A *double* attestation (the first being insufficient within the 1 & 2 Vict. c. 110, s. 9) does not invalidate a cognovit.

A cognovit was signed by W. T., and at-

tested thus—"Witness, J. B., of &c., attorney at law." "Signed in the presence of me the undersigned; and I hereby certify and declare, that I am the attorney of the said W. T., and that I attended at his request, to inform him of this cognovit, and that I have informed him of the nature and effect thereof; and I hereby subscribe my name as his attorney. R. R."—*Held*, sufficiently attested, and that the words "Signed in the presence" &c., must be taken to refer to the signature of W. T.

PASHLEY moved for a rule to shew cause why the cognovit given by the defendant in this cause should not be set aside, on the ground that it was not properly attested. There were two attestations, as follows:—

"Witness, J. Bryant, of &c., attorney at law."

Then followed (signed by a different attorney):—

"Signed in the presence of me the undersigned, and I hereby certify and declare that I am the attorney of the said W. Thompson, and that I attended at his request, to inform him of this cognovit, and that I have informed him of the nature and effect thereof; and I hereby subscribe my name as his attorney."

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"R. ROWDY."

Pashley contended that the words "signed in the presence," &c. were ambiguous, and might refer either to the signature of the defendant or to that of the attorney first-named as the witness; that it was consistent with what appeared on the face of the instrument that the second attorney might have informed the defendant of the nature and effect of the document after he had signed it in the presence of the first. [*Parke, B.*—Though the first attestation is irregular, yet if the defendant afterwards acknowledge his signature in the presence of another attorney who conformed in all respects to the statute, that is quite sufficient.] But it does not sufficiently appear here that the latter was a witness to the *defendant's* execution.

PARKE, B.—This attestation is quite sufficient. Your argument amounts to this, that a party can give but one cognovit, and if it be imperfectly attested, can never use the same paper to make a perfect acknowledgment. Nobody can doubt that the words "signed in the presence," &c. mean signed by the party who gave the cognovit. We must apply some common sense to the construction of such instruments: the decisions are sufficiently hard upon plaintiffs as it is. It is impossible to say that there is any ambiguity here, without applying a great deal more astuteness than I am disposed to do.

GURNEY, B., concurred.

Rule refused.

Exch. of Pleas,
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Jan. 27.

The assignees of a bankrupt may maintain an action in their own names only, for a chose in action belonging to the wife of the bankrupt before marriage, as a promissory note given to her *dum sola*.

And in such action, the defendant cannot set-off a debt due to him from the bankrupt.

YATES and Others, Assignees of ALDRICH, a Bankrupt, *v.*
SHERRINGTON.

ASSUMPSIT.—The declaration stated, that whereas heretofore, and before the intermarriage of the said Stephen John Aldrich, and Isabella Hannah, his now wife, and before the said S. J. A. became a bankrupt, to wit, on the 29th day of September, A. D. 1838, the defendant made his promissory note in writing, and thereby promised to pay to the said I. H. by her then name Isabella Hannah Sherrington, the sum of £100, with legal interest on demand, and then, before the said marriage and the said bankruptcy, delivered the said note to the said I. H.; and afterwards, and before the said S. J. A. became bankrupt, to wit, on the 30th day of May, A. D. 1839, the said S. J. A. intermarried with the said I. H., and thereupon afterwards, after the said intermarriage, and after the said S. J. A. became a bankrupt, and after the plaintiffs had become and while they were such assignees as aforesaid, to wit, on the day and year last aforesaid, the defendant, in consideration of the premises, promised the plaintiffs, as such assignees as aforesaid, to pay to them the money in the said note specified, with interest as aforesaid. And whereas before the said intermarriage, and before the said bankruptcy, to wit, on the 1st day of January, A. D. 1840, the defendant was indebted to the said I. H. the now wife of the said bankrupt, in £100 for money then lent by the said I. H. to the defendant at his request, and whereas in consideration of the last-mentioned premises, after the said intermarriage of the said bankrupt and the said I. H. and after the said bankruptcy, to wit, on the day and year last aforesaid, the defendant promised the plaintiffs, as assignees as aforesaid, to pay the last-mentioned money to them, as assignees as aforesaid, on request: Yet the defendant hath not paid the said monies and interest, or

EXHIBIT,

HILARY TERM, 6 VICT.

DRICH, a Bankrupt, v.

stated, that whereas
age of the said Stephen
his now wife, and be-
krupt, to wit, on the
the defendant made
thereby promised to
ame Isabella Hannah
legal interest-on de-
arriage and the said
o the said I. H.; and
A. became bankrupt,
A. D. 1839, the said
I. H., and thereupon
re, and after the said
er the plaintiffs had
signees as aforesaid,
said, the defendant,
mised the plaintiffs,
to them the money
as aforesaid. And
and before the said
January, A. D. 1840,
I. H. the now wife
ey then lent by the
st, and whereas in
nises, after the said
the said I. H. and
e day and year last
plaintiffs, as assig-
ntioned money to
uest: Yet the de-
and interest, or

either of them, or any part thereof, to the damage of
plaintiffs as assignees as aforesaid, of &c.

Plea, that he the defendant made the said promissory
note in the said first count mentioned, and delivered the
same to the said I. H. and was also indebted to her as in
the said last count mentioned, before her intermarriage
with the said S. J. A., and that after the said making and
delivery to the said I. H. of the said promissory note,
before the said bankruptcy of the said S. J. A., and whilst
the said note was in the possession of the said I. H., the
same was due and payable, and also whilst the defendant was
indebted to her as in the last count mentioned, to wit, on the
day and year in the said declaration in that behalf
mentioned, she the said I. H. intermarried with the
said S. J. A., and that after the said intermarriage,
in the lifetime of the said I. H., and whilst the said
note and the said money in the last count mentioned
were due and payable to the said S. J. A., he the said
S. J. A. became and was a bankrupt. And the defendant
further says, that the plaintiffs have commenced this
action and are prosecuting this action as the assignees of the
said S. J. A. to recover the sums so due to him before his
bankruptcy from the defendant as in this plea aforesaid
and not otherwise. And the defendant further saith, that
the said S. J. A., before and at the time of his bankruptcy
was indebted to the defendant in a large sum of money, to
wit, the sum of £2000 for money by the defendant before
that time lent and advanced, and paid, laid out, and ex-
pended for the said S. J. A., at his request, and for monies
the said S. J. A. before that time had and received for the
use of the defendant, and for money due and owing from the
said S. J. A. to the defendant for interest for the forbearance
of the defendant to the said S. J. A. at his request, for
long spaces of time, of monies due from the said S. J. A.
to the defendant, and for money due from the said S. J. A.
to the defendant on an account then stated between them

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v.
SHERRINGTON.

which said sum of money wherein the said S. J. A. was so indebted to the defendant as aforesaid, before and at the time of the commencement of this suit, was and still is due and owing to the defendant, and exceeds the damages sustained by the plaintiffs as assignees as aforesaid, by reason of the non-performance by the defendant of the alleged promises in the declaration mentioned, and out of which said sum of money so due to the defendant, the defendant is ready and willing and hereby offers to set off and to allow to the plaintiffs, as assignees as aforesaid, the full amount of the said damages, according to the form of the statute in such case made and provided. Verification.

Special demurrer, assigning for causes, that it appears that the amount of the money specified in the said promissory note in the said first count mentioned, and the debt in the last count mentioned, respectively were not, before or at the time of the bankruptcy, debts due to the said Stephen John Aldrich in his own right, but to him and the said Isabella Hannah his wife; and also, for that the said debts for the recovery of which this action is brought, and the said sum of money intended by the defendant in his said third plea to be set off against the said debts, are not mutual debts, and cannot be set off against one another; and also for that the said plea amounts to the plea of non-assumpsit; and also that it is an argumentative denial of the promise to the assignees, and also that it is in other respects informal, uncertain, and insufficient.

Joinder in demurrer.

The defendant's points, as marked for argument, were, that it sufficiently appears that the sums of money mentioned in the declaration were due to the said Stephen John Aldrich alone; that the said sums, and also the money mentioned in the defendant's third plea, are mutual

debts, and the defendant is entitled to set off the debts mentioned in his said plea against the debt for which this action is brought; that if the debts mentioned in the declaration were not the sole property of the said Stephen John Aldrich, so as to entitle the defendant to set off the said debt in his third plea mentioned, the plaintiffs cannot maintain the present action, because the right vested in the bankrupt, which the plaintiffs, as his assignees, seek to enforce, being, as supposed, vested in him jointly with his wife, she ought to have been made a co-plaintiff, or it ought to have been set forth how her interest in the debts mentioned in the declaration was determined; that if the defendant is not entitled to his said set-off, the pleadings disclose no sufficient cause of action in the plaintiffs to entitle them to maintain the present action; that the declaration discloses no new cause of action, arising after the bankruptcy, which would entitle the plaintiffs to maintain the present action, or deprive the defendant of his said set-off; that the declaration is bad, as it discloses no right of action upon which the present action can be maintained.

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The case was argued on the 25th of January, by

Erle, in support of the demurrer.—First, the assignees are entitled to maintain this action: for this was a debt which the husband was capable of recovering by joining his wife in an action, and it is therefore assets in the hands of the assignees, under the 6 Geo. 4, c. 16, s. 63. The case of *Miles v. Williams* (a) is a direct authority for the plaintiffs. That was a decision on the stat. 4 Anne, c. 17, s. 7, which enacted “that the bankrupt should be discharged from all debts by him due and owing at the time he became bankrupt.” The action was there brought against husband and wife on a bond given by the wife

(a) 1 P. Wms. 249.

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dum sola, and the defendants pleaded the bankruptcy of the husband after the marriage; to which plea the plaintiff demurred, on the ground that the wife's liability on the bond was not discharged by the statute; but the Court of King's Bench were all of opinion that the debt was the husband's debt, within the meaning of the statute. It was admitted at the bar, that a debt due *by* and a debt due *to* the wife must fall within the same principle; and in delivering the resolution of the Court, *Parker, C. J.*, says:—"And therefore I have considered how far a debt due to the wife would be within this act to be assigned by the commissioners of bankruptcy;" and after referring to the former statutes, 13 Eliz. c. 7, and 1 Jac. 1, c. 15, s. 12, he continues:—"Now I take the intention of these laws to have been, that the bankrupt, having been guilty of a fraud, should not be trusted any more with the management of his estate, but that it should be put into other hands for the safety of his creditors, and that the bankrupt should have no further intermeddling therewith. So that, upon this intention, all those effects *which he could take in and turn into money*, the assignees were designed to have in as full a manner, either by action or otherwise, *and that in their own name.*" That is an express decision, therefore, that a chose in action which belonged to the wife *dum sola* is assignable by the commissioners under her husband's bankruptcy, although not in fact reduced into possession by the husband before the bankruptcy. And that case was cited and sanctioned since the stat. 6 Geo. 4, c. 16, in *Michell v. Hughes(a)*, where it was held that a right by husband and wife, in right of the wife, to bring a writ of entry *sur abatement*, passed by the assignment on his bankruptcy to his assignees.

Secondly, the plea of set-off is bad. The debt for which this action is brought was the debt of the wife, and would

(a) 6 Bing. 689; 4 M. & P. 577.

have survived to her on the death of the husband. It was not absolutely the debt of the husband at the time of his bankruptcy, but only, as is said by Lord *Ellenborough*, in *Rumsey v. George* (a), “potentially so, i. e. provided he reduce it into possession during the coverture.” It was therefore held in that case, that the husband alone could not be the petitioning creditor to support a commission of bankruptcy, in respect of a debt composed partly of money due to him in his own right, and partly of money due to his wife *dum sola*. In *Ex parte Blagden* (b), it was decided that a debt due to the wife alone *dum sola* cannot be set off by the husband. If there had been no bankruptcy, and the husband had sued (as he must, the note not being negotiable) in his own and his wife’s name, this set-off could not have been taken advantage of. In *Burrough v. Moss* (c), where the action was brought by the husband alone, on a promissory note given to the wife *after* the marriage, it was held that the defendant could not set off a debt due from the wife *dum sola*.

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Peacock, *contra*.—The plea undoubtedly cannot be supported, unless, looking at the allegations in the declaration and in the plea, the Court shall think that this note must be taken to have been reduced into possession by the husband. But the same authorities which shew the plea to be bad, shew also that the action cannot be maintained by the assignees alone. The cases cited on the other side are distinguishable from the present in this respect, that this is an action brought upon a contract entered into by the wife before the coverture. In *Burrough v. Moss* the husband had an election to sue in his own name or not. The cases on this subject were reviewed in *Gaters v. Madeley* (d), where it was held that a promissory note was nothing more than a

(a) 1 M. & Selw. 176.

(b) 2 Rose, 149.

(c) 10 B. & C. 558.

(d) 6 M. & W. 423.

Exch. of Pleas, chose in action, and when given to a married woman, survives to her, unless the husband elect to take it. The

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question then is, what is the effect of the husband's bankruptcy upon the wife's *choses in action*? *Michell v. Hughes* related to the real property of the wife, in which the husband takes in right of the wife a freehold interest, which passed to his assignees. *Miles v. Williams* was an action *against* the husband and wife, and no question arose who was to sue for the debt after the husband's bankruptcy. Now, the right to the wife's debt passes to the assignees only in the same way as to the husband, and they ought therefore to bring the action in the names of the husband and wife. *Rumsey v. George* is an express authority that in such a case as this it is not the debt of the husband. No doubt, the right which the husband has in the wife's chose in action is part of his *personal estate*; that is, his right to reduce it into possession in their joint names. In *Mitford v. Mitford (a)*, Sir William Grant points out the distinction between a particular assignment by the husband, for valuable consideration, of the wife's chose in action, and an assignment by operation of law, as in case of his bankruptcy. And in *Pierce v. Thornely (b)* the Vice-Chancellor says expressly:—"If the husband of the wife who had a debt due to her *dum sola*, had become bankrupt, the assignees could not recover payment of the debt, without bringing an action in their own names and the name of the wife jointly; for by the commissioners' assignment they take an interest in the debt, in the same manner as the husband had it; and if, after proceeding in the action, and before execution levied, the husband died, at law the chose in action would survive to the wife, and she might release the defendant as a co-plaintiff, or release the defendant as entitled to it by survivorship. At law, the wife's chose in action could only be recovered in an action in which she was made a co-plaintiff

(a) 9 Ves. 87.

(b) 2 Sim. 167.

with the husband, or with his assignees in case he became bankrupt." The bankruptcy of the husband cannot have the effect of rendering the defendant liable to two actions. If the husband and wife had sued before the bankruptcy, the defendant certainly might have set off a debt due from the wife *dum sola*; but if this note pass to the assignees as a debt due to the husband, the defendant is deprived of that set-off, unless the wife be joined with the assignees in the action, or they are bound to sue in the names of the husband and wife. Their right of suing *in their own names* extends only to debts due to the husband in his own right: in that case no hardship is imposed upon the defendant.

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Erle, in reply.—The action is well brought in the names of the assignees alone. The 63rd section of the bankrupt act says expressly, that the assignees shall have "like remedy to recover the same [i.e. the debts due to the bankrupt] in their own names," as he might have had if he had not been adjudged bankrupt. Here it was in the bankrupt's absolute control to sue this defendant on the note; although for conformity's sake the wife is joined with him in the action, she has no control or option in respect of it. Whatever the bankrupt himself might have made valuable as a part of his estate, the assignees have a right under the statute to recover. The right to sue for a debt due to the wife is a right vested in the husband alone, and that right passes by the assignment to the assignees alone.

Cur. adv. vult.

The judgment of the Court was now pronounced by

LORD ABINGER, C. B.—In this case the judgment of the Court will be for the plaintiffs. We think the case cited by Mr. *Erle* from Peere Williams, of *Miles v. Williams*, is

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in point, and is decisive of the present. Lord *Macclesfield*, then Lord Chief Justice of the King's Bench, decided in that case, according to the report, that for a chose in action which belonged to the wife of a man before her marriage, an action might be maintained by the assignees of the husband, who had become bankrupt; that the assignment was an absolute transfer, which enabled the assignees to institute a suit to reduce it into possession, without the concurrence of the wife. No doubt, if the interest of the wife is not extinguished by the assignment to the assignees of this chose in action (which is a promissory note given to the wife before her coverture), it will follow that some sort of remedy remains to her. If her husband should die before the assignees have recovered the amount of the note by judgment and execution, the question will then be open, what remedy the wife has: in the meantime, the case cited is a precise authority that the assignees are entitled to enforce the recovery of this chose in action in their own names. And if they can sue in their own names, it is clear that a set-off cannot be enforced against them for any claim in respect of a debt due from the husband. That has been settled in several cases, and indeed was not disputed on the argument. The judgment must therefore be for the plaintiffs.

Judgment for the plaintiffs.

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Jan. 19.

Cocks and Others v. BREWER and Wife.

DEBT on a judgment against Llewelyn Brewer and Elizabeth his wife.—The declaration stated that whereas the plaintiffs theretofore, to wit, on the 31st May, 1842, had recovered, by the consideration and judgment of the said Court of Exchequer, against the said Elizabeth, by the name of Elizabeth Rogers, in an action on promises, 1532*l.* 9*s.* 6*d.*, which said promises were so made by the said Elizabeth when she was sole and unmarried.

Plea, nul tiel record, which was traversed by the replication.

The plaintiffs having given notice of producing the record and applying for the judgment, and the record being produced accordingly, it appeared that the original action had been brought and the judgment recovered against Elizabeth Rogers and several other persons who were defendants with her.

Whateley, on the part of the defendants, contended that they were entitled to judgment, on the ground that, the action having been brought not against Elizabeth Rogers alone, but against her and several other persons, there was a fatal variance between the record declared on and the one produced. The plaintiffs, in pleading this judgment, should have stated it to have been obtained against Elizabeth Rogers and others. The rule is thus laid down in Com. Dig., "Record," (C): "If a man pleads nul tiel record, and there be a material variance between the record itself and the record pleaded, it will be a failure of the record." And these instances are given: "If the name of any party, his abode, or addition varies," "or there are more or fewer persons parties." [*Parke*, B.—The question is whether the defendants ought not to have pleaded in abatement.] The distinction is, where the

In an action of debt on a judgment brought against L. B. and E. his wife, the declaration alleged that the plaintiff, on &c., recovered judgment against the said E. by the name of E. R., in an action on promises, which promises were made by her the said E. whilst she was sole and unmarried. Plea, nul tiel record.—On the judgment being produced in Court, it appeared to have been recovered against E. R. and others:—*Held*, this having been objected to on the ground of variance, that such objection was invalid; and that the objection, if any, should have been taken by plea in abatement.

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record is set out as mere matter of inducement, in which case less particularity is required, and where it is the foundation of the action, in which case there must be an averment of prout patet per recordum, and then it is matter of substance, and a variance is fatal. In *Rastall v. Stratton* (a), the declaration stated that, in *Trinity Term* 1787, the plaintiff recovered by a judgment in B. R. 42l. 1s. for his costs in the defence of an action brought by the defendant against him the said plaintiff in that Court. Plea, nul tiel record. The indictment, when read, appeared to be of *Easter Term*, and to have been recovered in an action brought by the defendant against the plaintiff and one Avarne; and on both these grounds, but chiefly on the last, the Court gave judgment for the defendant. [*Parke, B.*—That case is not in point. There there was a substantial variance; the costs were adjudged to the plaintiff and Avarne, and there was a debt due to both, which was a clear misdescription. Lord *Abinger, C. B.*—In that case there was a joint debt. *Alderson, B.*—In this case there is a judgment by the same plaintiffs against the same defendant, only it is against others also.] The authorities shew that the record, being the foundation of the action, must correspond with the statement in the declaration.—He cited *Few v. Backhouse* (b), *Bevan v. Jones* (c), *Sheldon v. Whittaker* (d). *Stoddart v. Palmer* (e) shews the distinction, that where the allegation is matter of description only, and not the foundation of the action, but mere inducement to it, there it is no variance.

E. V. Williams, contra.—The objection here is, that there is a variance between the statement of the judgment in the declaration and the record produced; but there is no variance. As to the distinction between a declaration

(a) 1 H. Bl. 49.

(b) 8 Ad. & Ell. 789; 1 Per.
& D. 34.

(c) 4 B. & Cr. 403.

(d) 4 B. & Cr. 657.

(e) 3 B. & C. 2.

setting out a record with a prout patet or not, that seems to be abandoned, for although Lord *Ellenborough*, in *Purcell v. Macnamara* (a), intimated an opinion that if there had been such an averment, it might have been considered as descriptive of the record, and that the variance would have been fatal; the Court in giving judgment in *Stoddart v. Palmer*, overrule that opinion and state it not to be a correct one, and that "it is an unnecessary allegation, and may be rejected as surplusage; and if it can be altogether struck out of the declaration without injuring the plaintiff's cause of action, the proof necessary to support such an allegation (when material) need not be given." Therefore it makes no difference whether there be an averment of prout patet per recordum or not; and the real question is, whether a contract alleged to have been made by a defendant, or a judgment recovered against him, is the less his contract or the less a judgment against him, because either the contract was made by him jointly with others, or the judgment was recovered against him and others. [*Parke*, B.—A scire facias on a recognizance must be against all the parties, or it is demurrable unless it shew why the others are not sued, as for instance, that they are dead, or the like.] Yes, so it is in an action on a judgment, the action must be brought against all, or it is subject to a plea in abatement. [*Parke*, B.—In *Rex v. Young* (b), it was held that a sci. fa. having been issued against two defendants on a joint and several recognizance of four persons, the declaration was bad, and might be taken advantage of without a plea in abatement. Would not that equally apply to an action on a judgment?] Yes, if it appeared by the declaration that there were other parties against whom the judgment was obtained who are alive, the declaration would be demurrable. *Rastall v. Straton* is distinguishable, and there the Court

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(a) 9 East, 161.

(b) 2 Anstr. 448.

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gave leave to amend by inserting the name of the other party. And at the time that case was decided, the Courts would have treated a non-joinder as a ground of variance, and would have set aside the proceedings; but in *Spalding v. Mure* (a), the Court held they could not set aside the proceedings on the ground of variance. In the note to *Cabell v. Vaughan* (b) it is said, "Generally speaking, all joint obligors or contractors ought to be made defendants, and the plaintiff may be compelled to join them all, if the advantage be taken of the omission *in due time* and by *a proper plea*." And it is stated to be now "settled, that in all cases of a joint obligation or deed &c., if one only be sued, *he must plead the matter in abatement*, and cannot take advantage of it afterwards upon any other plea, or in arrest of judgment, or give it in evidence." And in *Rice v. Shute* (c), it was held that a plaintiff was improperly nonsuited who had brought his action against one partner but had omitted to join another. So in *Broadbent v. Ledward* (d), it was held that in detinue, upon issue joined upon a plea denying property in the plaintiff, it was no defence that there were other persons, co-tenants with the plaintiff, who were not joined in the action. There it was urged in argument, that the reason why all the parties to a contract must be joined is to avoid a variance: but *Patteson, J.*, in answer says: "That is an untenable ground, for then it would be a variance if all persons who ought to be co-defendants were not joined." And he says at the conclusion of the case: "The rule as to the consequence of the non-joinder of parties as plaintiffs in actions founded upon contract is not satisfactory in principle, and ought not to be extended." The reason why it is fatal not to join a party plaintiff is on a ground totally distinct from the ground of variance, as it is put in *Rastall v. Straton*

(a) 6 T. R. 363.

(d) 11 Ad. & Ell. 209; 3 Per. &

(b) 1 Wms. Saund. 291.

D. 45.

(c) 5 Burr. 2611.

and *Spalding v. Mure*; viz. because the plaintiff must be presumed to know his own partners who joined him in the contract, although he might not know the names of all who were co-contractors with the defendant. The doctrine laid down in *Spalding v. Mure*, that "under a count for money had and received by three defendants to the use of the plaintiffs, the latter could not give evidence of money had and received by the three defendants and a fourth," was overruled in *Richards v. Heather* (a), which was confirmed by *Mountstephen v. Brooke* (b). And in the latter case, where the declaration stated the bill of exchange to be drawn upon and accepted by three persons, and it was proved to have been drawn upon and accepted by the three jointly with a fourth, it was held to be no variance. Therefore, if a bill accepted by three may be treated as a bill accepted by one, so a bond executed by three may be treated as the bond of one. So here, although the judgment is the foundation of the action, and it is joint to that extent, the defendants may by pleading in abatement compel the plaintiffs to sue the others. If the plaintiff sues only one out of several defendants, the action may be defeated by a plea in abatement. [*Parke, B.*—Could the defendant have pleaded this in abatement? When several persons enter into a recognizance, a declaration against some of them is demurrable, unless it shews why the others are not sued, as from their being dead or the like; and that is because a sci. fa. being founded on a record, the declaration ought to set forth the cause of variance from it. Besides the case of *Rex v. Young* I before referred to, there is the case of *Blackwell v. Ashton* (c), where this distinction was taken. That was the case of a sci. fa. against three bailees, brought upon a recognizance acknowledged by them and the principal jointly and severally; and upon demurrer, it was held that the writ abated, be-

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(a) 1 B. & Ald. 29.

(b) *Id.* 224.

(c) *Aleyn*, 21.

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cause this being founded upon a record, the plaintiff ought to shew forth the cause of the variance from the record, as that one was dead: but if an action be brought upon bond in the like case, there the defendants ought to shew that it was made by them and others in full life, not named in the writ, because the Court shall not intend that the bond was sealed and delivered by all that are named in it; and therefore the defendant cannot demur. Is this case distinguishable from those?] Yes, they stand on a totally different ground. A sci. fa., although for some purposes considered in the light of an action, is also a continuation of the original action, and is a species of execution, which should strictly follow the judgment on which it is founded. It is submitted, that it is no variance that a judgment obtained against A., B., and C., be stated as a judgment recovered against A. only, because if it is a judgment against the three, it is equally a judgment against one.

Whateley, in reply.—This is a fatal variance; and the mode here adopted is the proper mode of taking the objection, and the defendants are not bound to plead in abatement.—He relied upon *Rastall v. Straton*.

Cur. adv. vult.

LORD ABINGER, C. B.—My Brother *Parke* entertained some doubts whether this case was not governed by the authorities relating to proceedings by sci. fa. on recognizances. But after looking into the cases, he is satisfied: and the Court are now unanimous in thinking that the distinction taken by Mr. *Williams* in argument is well founded; viz. that the sci. fa. is a quasi continuation of a matter of record, in order to have execution thereon. But an action of debt on a judgment, being founded on the consequent duty, is not to be differed in prin-

ciple from the ordinary case of an action of debt against one of several joint-contractors; to which an objection cannot be taken on the ground of variance, but only, if at all, by way of plea in abatement. Judgment, therefore, must be entered for the plaintiffs.

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Judgment for the plaintiffs.

FOWLER v. JAMES CHURCHILL and ELIZABETH
CHURCHILL.

Jan. 27.

THE plaintiff having proceeded to judgment in this action, *Parke, B.*, on the 6th December, 1842, made the following order for charging certain dividends of stock payable to the defendant, Elizabeth Churchill, under the stat. 1 & 2 Vict. c. 110, ss. 14 and 15: "I do order, that unless cause be shewn to the contrary before a Judge at Chambers, within a month from the date hereof, by the defendant Elizabeth Churchill, her attorney or agent, the dividends due and to accrue due upon the sum of £5000 New 3½ per centum Bank Annuities, now standing in the books of the Governor and Company of the Bank of England, in the name of William Churchill, together with George Churchill deceased, in trust for her the said defendant Elizabeth Churchill, shall stand charged with the payment of the sum of 213*l.* 10*s.*, being the sum remaining due on the judgment recovered in this action, with interest thereon, pursuant to the statute in such case made and provided; and I do further order, that in the mean time, and until this order be made absolute, or discharged, the said sum of £5000 New 3½ per centum Bank Annuities shall stand charged with the payment to the said plaintiff of the said sum of 213*l.* 10*s.* and interest, as aforesaid; and I do

Where a testator by his will directed that certain stock should stand in the names of his executors, and the dividends should be paid to G. C. during his life, and on his death to E. C., his widow, "she to lay it out for the good of his children," and that when the youngest child should come of age, the fund should be sold out and divided amongst the children:—*Held*, in an action in which E. C. (after the death of G. C.) was a defendant, that an order might be made under the stat. 1 & 2 Vict. c. 110, ss. 14 and 15, for charging "so much of the dividends as were payable to E. C. for her own use and benefit."

dividends as were payable to E. C. for her own use and benefit."

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further order, that a copy of this order be served (if possible) on the defendant Elizabeth Churchill."

Against this order cause was shewn at Chambers before Rolfe, B., on the 12th of January; when it appeared that the defendant claimed the stock under the will of James Churchill, deceased, whereby he bequeathed as follows:—

"I give and bequeath to my brother George Churchill, for his natural life, the interest or dividend from £5000 New 3½ per cent. government stock, which now pays a dividend at the Bank of England of £175; this said dividend, or any other dividend that government may pay, shall be paid to him half yearly, if convenient, for and during his natural life; he shall never sell or part with this said interest or dividend in any way whatsoever during his lifetime, until it has become due; and if he the said G. C. should die or become a bankrupt, then the said dividend shall be paid to his wife, if she shall be then living, for her life, *she to lay it out for the good of his children*; but if she should be the longest liver, and get married again, then she shall have nothing more to do with the money; the executor or executors shall then have full control over the money, and shall lay it out as they shall think best, for such of the children as remain under age; and when the youngest child becomes of the age of twenty-one years, then this said £5000 stock shall be sold, and the money shall then be equally divided between such of the said G. C.'s children that shall be then living, equally share and share alike; no one of the said children shall be allowed, or shall ever sell or part with his or her share or interest in this said money, until it shall be divided; if, on proof of any one or more of them having done so, then his or her share will from that time become the property of the other children; and when the said stock shall be sold, his or her share shall be divided between those other children that shall not have sold. This said stock to stand in the names of my executors, and if the government shall

reduce this said interest, then it must stand in the reduced stock."

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George Churchill, the legatee, had died, leaving the defendant Elizabeth Churchill his widow, and two children, one of whom is a minor. The following order was made on the hearing by *Rolfe*, B.:—"I do order, that so much of the dividends only as is payable to Elizabeth Churchill for her sole use and benefit, arising from and accruing due upon the sum of £5000 New 3½ per cent. Bank Annuities, now standing in the books of the governor and company of the Bank of England, in the name of William Churchill, together with George Churchill deceased, in trust for the defendant Elizabeth Churchill, shall stand charged with the payment of the sum of 218*l.* 10*s.*, being the sum remaining due on the judgment recovered in this action, with interest thereon, pursuant to the statute."

On a former day in this term, *Petersdorff* applied to the Court for a rule to shew cause why the latter order should not be rescinded; when the Court intimated that it might be questionable whether they had authority to interfere, inasmuch as the stat. 1 & 2 Vict. c. 110, ss. 14 and 15, vests the power of charging stock, by means of such an order, expressly in *a judge*, to whom it gives entire discretion in the matter, making no mention of any appeal to the Court. The learned counsel now stated, that he had found two cases cited in *Wilkinson* on the Public Funds, p. 844, in which considerable doubt appeared to have been entertained on this point; and in *Brown v. Bamford* (a), it was expressly held, that a judge at Chambers only has original jurisdiction to make the order. [*Alderson*, B.—But that case also laid it down, that if the judge has made an order absolute, an application may be made to the Court to set it aside; and it is every day's practice to come to the Court in similar cases.]

(a) 9 M. & W. 42.

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Petersdorff then proceeded to contend, that under the statute the judge had no power to make an order, unless it clearly appeared that the judgment debtor had a specific interest in the fund; the words being—"any government stock, &c. standing in his name in his own right, or in the name of a person in trust for him;" whereas here the defendant was, under the will, a mere trustee in order to provide for the interests of the testator's children. If the fund were chargeable at all, it must be under the subsequent statute of 3 & 4 Vict. c. 82; but this order could operate only under the 1 & 2 Vict. c. 110. [Lord *Abinger*, C. B.—If the fund be more than sufficient for the purpose of the trust, has not she a beneficial interest in the surplus?] She is to "lay it out"—i. e. the fund—"for the good of the children;" not merely to provide a maintenance for them out of it. At least, the order should contain some specific definition of the extent to which the fund is chargeable. This order is a conditional charge upon the whole, and will have the effect of stopping the payment of the dividends. The legislature never meant to place trustees in such a position.

ALDERSON, B.—The effect of the order is not to prevent the Bank from paying the dividends to the trustees; it is for them, afterwards, to exercise a discretion as to what part of the fund they will pay over, without considering the interests of the judgment debtor. If they have any doubt as to the extent to which the parties are respectively entitled to the money, they may apply to the Court of Chancery. Suppose the debtor had, by deed of assignment, said—"I charge all my dividends with this judgment, with notice to the trustees:"—This order has no further effect.

ROLFE, B.—The effect of the order is not to restrain a transfer of the dividends; the trustees may continue to receive them notwithstanding. They may indeed say, that

it is too doubtful for them to say how much is to be applied to the one and how much to the other purpose, and therefore that they will not act without the authority of the Court of Chancery; and it appeared to me that the object was to induce me to make an order, which should dispense with the necessity of their going into equity.

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Lord ABINGER, C. B., and PARKE, B., concurred.

Rule refused.

EDR v. COLLINGEIDGE.

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W. H. WATSON had obtained a rule calling upon the plaintiff to shew cause why the proceedings upon the bail-bond given by the defendant in this cause, under the 1 & 2 Vict. c. 110, s. 4, should not be set aside on payment of costs. The writ of summons was issued on the 15th November, 1842; on the 22nd, the defendant was arrested on a capias issued under the above statute, and on giving the bail-bond was discharged out of custody. Having failed to perfect bail in due time according to the practice of the Court, the plaintiff, on the 9th of December, took an assignment of the bail-bond from the sheriff, and on the 12th December an action was commenced thereon. On the 12th January bail was perfected. The plaintiff had not proceeded with the original action after the issuing of the capias. The affidavit on which this rule was obtained did not depose to merits.

Where a capias issues against a defendant, under the 1 & 2 Vict. c. 110, s. 4, and he gives a bail-bond to the sheriff according to the statute, but omits to perfect bail in due time according to the practice of the Court; the Court will, on his afterwards putting in and perfecting bail, set aside, on payment of costs, proceedings which have in the meantime been commenced upon the bail-bond.

J. Henderson now shewed cause.—The rule of practice, as laid down in the rule of H. T. 2 Will. 4, is still applicable, the fourth section of the 1 & 2 Vict. c. 110, having provided that all the proceedings as to putting in and per-

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fecting bail shall be according to the existing practice of the Courts. [*Alderson*, B.—The proceeding byailable process is now wholly collateral, whereas before the statute, until the party put in bail, he was not in Court. Lord *Abinger*, C. B.—The not putting in special bail does not now delay the plaintiff at all; he may go on with the original action notwithstanding. The object is only to obtain security in case the defendant goes abroad: that security is obtained, if he renders or puts in special bail.] Here the plaintiff has not proceeded with the original action. [*Parke*, B.—Then he should be put in the same position: because, having a right of action on the forfeiture of the bail-bond, is he to go to the expense of proceeding in the original action, upon the chance of the defendant coming and putting in bail on some future day?] No terms which the Court can now impose can put the plaintiff in the same position as if there had been no laches on the part of the defendant. If he had gone on with the original action, it might have been said he was multiplying costs: he had the choice of two remedies given him by the law, and chose that which appeared the most effectual.

PARKE, B.—It should be understood in future, that the taking an assignment of the bail-bond does not affect the right of the plaintiff to proceed in the original action: therefore, if the attorney wishes to avoid delay, he must go on with the original action promptly to judgment, notwithstanding the assignment of the bail-bond.

The rest of the Court concurring,

Rule absolute on payment of costs; the defendant to plead issuably, and take short notice of trial (a).

(a) See *Betts v. Smyth*, 1 G. & D. 284; *Regina v. Sheriff of Montgomeryshire*, 9 M. & W. 448.

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STEWART, Public Officer, &c., v. DUNN, Public Officer, &c.

THIS was an action of debt, brought by the "East of England Bank" in the name of their public officer, against the Southern District Banking Company, sued in the name of one of their public officers, who was also a shareholder in the Company. The declaration contained counts for money lent, money paid, money had and received, interest, work and labour and attendance, and money due on an account stated. *Rolfe*, B., made an order allowing the defendant to plead the following pleas:—First, *nunquam indebitatus*; secondly, payment; thirdly, a set-off; fourthly, that the plaintiff was not public officer as alleged in the declaration; fifthly, that the defendant was not public officer as alleged; sixthly, that there was no such co-partnership as that secondly mentioned in the declaration; seventhly, that the co-partnership secondly mentioned did not carry on business as therein alleged; and lastly, a judgment recovered. The learned Judge also directed a stay of proceedings, in order to give the defendant an opportunity of applying to the Court for leave to amend the order, by adding a plea of the defendant's bankruptcy.

In an action against the public officer of a banking co-partnership, the Court set aside a plea of the defendant's bankruptcy, on the plaintiff's undertaking not to sue out execution personally against the defendant, his lands, or goods.

Kelly having obtained a rule nisi accordingly,

Erle and *Butt* now shewed cause.—The proposed plea ought not to be allowed; for the bankruptcy of the defendant in his private capacity can be no defence to an action against him, when sued as the public officer of the company. *Wood v. Marston (a)* (where a similar plea had been pleaded, and an application was made to strike it out) is precisely in point. Lord *Abinger*, C. B., who delivered the judgment of the Court, there said—"The pleas

(a) 7 Dowl. P. C. 865.

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may be struck out, if the plaintiff will undertake, on obtaining a judgment against the defendant, not to take out execution against him or his individual estate, but against the members of the company only." The same arrangement was offered before the learned Judge in the present case. By the 7 Geo. 4, c. 46, s. 12, judgments obtained against the public officer of a banking co-partnership are to operate against the property of the co-partnership, and of every member thereof; and it is provided, "that the bankruptcy, insolvency, or stopping payment of any such public officer for the time being of such co-partnership, in his individual character or capacity, shall not be nor be construed to be the bankruptcy, insolvency, or stopping payment of such co-partnership." It may be said on the other side, that inasmuch as, in the event of the defendant's becoming hereafter entitled to landed property, the judgment would be a charge upon the land, he is therefore entitled to plead his bankruptcy, and is not bound to accept the undertaking offered. But that is not so, for this is an action brought against him, not in his individual character, but as public officer; and that by compulsion, since it is now established that the creditors cannot proceed against the individual members of the co-partnership, but *must* sue the public officer: *Stewart v. Greaves* (a). The plea of bankruptcy would be a plea alleging as a defence to the whole action that which clearly does not constitute any defence to the whole action. If, however, the defendant is desirous of having the validity of the plea hereafter considered on demurrer, he ought to plead it alone. But this being an action against several persons, how can a plea of the bankruptcy of one possibly be any answer? The Court will therefore, in the exercise of their discretion, disallow this plea, at all events on the terms offered by the plaintiff.

(a) 10 M. & W. 711.

Kelly and Ogle, contra.—*Wood v. Marston* is no authority against the defendant. The Court, in that case, merely threw out a suggestion that the plea should be abandoned on the plaintiff's undertaking not to sue out execution against the defendant; that suggestion was adopted, and the plea was struck out by arrangement between the parties, and not under any judgment of the Court. Bankruptcy is a legal defence, expressly given by statute, of which a defendant has as clear a right to avail himself as of the statute of limitations, or any other statutable defence. [Lord Abinger, C. B.—But here he is sued as a trustee.] So far as regards the rest of the company, no doubt he is; and if the plea, being pleaded to the whole action, forms no defence as to them, it may be questioned by a demurrer: but he is sued as well in his own person as in his capacity of public officer. The undertaking not to issue execution against him will not be a sufficient protection, since the judgment will stand as a charge upon his lands, and of course seriously affect the conveyance of them. [*Parke*, B.—The undertaking not to issue execution will prevent the judgment from operating against the lands; they can be affected only by means of an elegit, which is an execution.] The only leave that was asked of the learned Judge was to plead a plea of bankruptcy; it would be matter for subsequent consideration whether it should be in the usual form. [*Parke*, B.—We must assume that you asked for it as a plea in bar of the whole action.] The Court will perhaps mould the rule, and allow the defendant to add some plea whereby he may effectually protect himself.

LORD ABINGER, C. B.—The Court will not allow a party sued as a public officer to plead a great number of pleas, and also to add a plea of his own personal bankruptcy, in bar of an action in which he is sued merely as the representative of the company. The plea suggested would be

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plainly bad, inasmuch as the action is, on the face of it, against the co-partnership, and the defendant is a mere parliamentary defendant; it is impossible that his bankruptcy can be a good plea to the whole action. The act of Parliament makes him the sole defendant, as the representative, perhaps, of several hundreds; and if he is at liberty to plead a matter merely personal to himself in bar of such an action, he confers the benefit of that defence on all those whom he represents as defendant; a benefit which certainly the legislature never intended they should have. The question at present is, whether the order of my Brother Rolfe shall be amended; and we are all of opinion that he was quite right in rejecting this plea of bankruptcy. The rule will therefore be discharged with costs, the plaintiff undertaking not to issue execution against the person, lands, or goods of the defendant individually.

PARKE, B.—If the defendant had come before the learned Judge with a plea framed specially to exempt the defendant personally from execution, for instance, a special plea of exemption, in analogy to the old form of proceeding when a party had become bankrupt a second time, and had not paid 15*s.* in the pound under the second commission, the learned Judge would have exercised his opinion upon it, and possibly, though I do not say positively how that would be, he might have allowed such a plea. But he was quite right in refusing to allow a general plea of bankruptcy, because it is clearly no bar to this action, and we ought not, in exercising our discretion under the statute of Anne, to allow a bad plea to be placed on the record. The undertaking, however, which is offered on the part of the plaintiff, places the matter on a very reasonable footing.

ALDERSON, B., and ROLFE, B., concurred.

Rule discharged with costs, the company undertaking not to take out execution against the defendant or his individual estate.

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BROOKER v. SCOTT.

ASSUMPSIT for goods sold and delivered. The defendant pleaded a plea of infancy, to which there was a replication of necessities. The cause was tried before the undersheriff of Cambridgeshire, when it appeared that the action was brought to recover a confectioner's bill, for goods supplied to the defendant, an undergraduate of Trinity College, Cambridge, he being then a minor, and living in lodgings in the town. The bill consisted of charges for dinners, desserts, pastry, and fruit, extending from December 13, 1840, to January 7, 1842, and amounting in the whole to 7*l.* 0*s.* 7*d.* Among the items were the following:—

1841:	<i>s.</i>	<i>d.</i>
Feb. 17. Soda water and acidulated drops .	1	6
Mar. 22. Lozenges	0	4
April 13. Oranges, jelly, biscuits, and pastry	2	9

At the trial, it was objected that none of these articles could be considered necessities, and therefore that the defendant was entitled to a nonsuit. The undersheriff reserved the point, and the plaintiff had a verdict, damages 7*l.* 0*s.* 7*d.*

Byles having obtained a rule nisi to enter a nonsuit pursuant to the leave reserved,

Humfrey now shewed cause.—There was some evidence for the jury, as to some of the items of this bill, that they were articles reasonably necessary for a person in the condition and station of life of the defendant; and if that were so, the undersheriff could not have nonsuited. Such is the rule laid down in *Peters v. Fleming* (a). [*Parke, B.*

Dinners, confectionery, or fruit, supplied to an infant, an undergraduate in the university, having lodgings in the town, are not, *prima facie*, necessities: and in an action brought against him for such articles, no special circumstances being shewn, the Court directed a nonsuit to be entered.

(a) 6 M. & W. 43.

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—A dinner out of Hall could hardly be a necessary. *Primâ facie*, all these articles, being eatables, are not, under the circumstances, necessities, and the tradesman must shew them to be so.] In *Peters v. Fleming*, Parke, B. says:—“It is perfectly clear, that from the earliest time down to the present, the word *necessaries* was not confined, in its strict sense, to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is.” [*Alderson*, B.—That is to be understood with this qualification, which is pointed out in the same judgment, that the articles be *useful*. If they are useful, whether they be necessities will depend on the condition and quality of the individual. But these are articles merely useless and luxurious. Parke, B.—Here you start with this, that college supplies everything which is necessary for a pensioner there.] Not so; college does not supply, for instance, tea or milk: suppose instead of that the party chooses to take biscuits and soda water? Are not oranges, for example, reasonably requisite for the station of life of the defendant? So, lozenges may have been taken medicinally. [*Parke*, B.—If there be special circumstances, you ought to shew them; but *primâ facie* an undergraduate need not dine out of Hall.]

Byles, contra, was not called upon.

LORD ABINGER, C. B.—The question is, whether on the face of this bill we see any articles that we think should have been considered by the jury, under all the circumstances of the case, as necessities; and we think there are none.

PARKE, B.—This is the case of a young man resident in the town, and having from his college everything necessary for a person in *statu pupillari*. The only items which could

possibly be necessaries under any circumstances are those to which Mr. *Humfrey* has referred. If there had been any explanation of the circumstances under which they were supplied, it might possibly have varied the case; but no explanation whatever is given of them.

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ALDERSON, B., and GURNEY, B., concurred.

Rule absolute.

ANGUS v. REDFORD.

Jan. 30.

CASE by the reversioner against the defendant, for the wrongful continuance of a wall, certain rooms, and a gutter, alleged by the plaintiff to have been wrongfully erected by a party, under whom the defendant claimed by devise, upon the plaintiff's premises. There was another count for pulling down a board affixed to the plaintiff's premises, and thereby injuring his wall. The cause stood for trial before *Coltman, J.*, at the last Sussex Assizes, when a verdict was taken for the plaintiff by consent for the damages laid in the declaration, subject to a reference; and by the order of reference, the arbitrator was empowered to direct that a verdict should be entered for the plaintiff or for the defendant, as he should think proper, and "to determine what he should think fit to be done by either of the parties." It appeared upon the evidence, that the plaintiff was the reversioner of a house and premises, adjoining one which was in the occupation of a lessee of the defendant, the defendant being entitled to it as tenant for life; and the matters in difference between the parties were, whether the defendant had a right to use the plaintiff's back wall for the

An arbitrator to whom a cause is referred, with power to direct how the verdict shall be entered, has no authority to arrest the judgment.

Where, in an action on the case by a reversioner, which was referred by order of nisi prius to an arbitrator, he awarded (inter alia) that the action was brought to try a right, besides the mere right to recover damages:—

Held, that he was not bound to state *what* was the right which the action was brought to try.

Where, by an order of reference, the arbi-

trator is "to determine what he shall think fit to be done by either of the parties," he is not bound to direct affirmatively that some thing shall be done, unless he shall so think fit. Per Lord *Abinger, C. B.*, *Alderson, B.*, and *Gurney, B.*; *Parke, B.*, dissentiente.

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inside of her rooms, and to plaster and paint it over, and to carry a water-pipe round the plaintiff's chimney to the lead flat above the plaintiff's premises, and whether she had a right to the support of the plaintiff's wall. The arbitrator, having viewed the premises, directed the parties to state to him in writing the matters which were not in issue in the cause, but upon which he was to adjudicate. Certain matters, not in issue in the cause, were subsequently brought before him, but he was not expressly required in writing to adjudicate on them. The defendant's counsel argued, before the arbitrator, that the first count of the declaration was bad, and that he was bound, in case he should find the issue thereon in favour of the plaintiff, to arrest the judgment on that count. The arbitrator, however, refused to arrest the judgment: and on the 12th of November he made his award, whereby, after reciting that the only matters in difference brought before him, beyond those which were in difference in the action, were the user by the defendant of the plaintiff's back wall, the plastering and painting the same, the carrying the water round the plaintiff's chimney, and the injuring of the plastering and timbers of the plaintiff's room—he awarded that the verdict should stand for the plaintiff as to all the issues, except so much of the first issue as related to the second count, and as to that issue, that it should be entered for the defendant; that the damages should be reduced to 1s.; and that the action was brought to try a right beyond the mere right to recover damages. He then proceeded to award, as to the matters in difference between the parties beyond the matter in difference in the action, that the plaintiff had no valid claim against the defendant in respect of any or either of them.

Early in this term, *Peacock* obtained a rule calling on the plaintiff to shew cause why the award should not be set aside, on the following grounds:—firstly and secondly,

that the arbitrator had not determined with certainty several matters in difference submitted to him [stating them]; thirdly, that he had not determined whether judgment should be entered for the plaintiff upon the verdict so ordered to stand for him, or whether judgment thereon should be arrested; fourthly, that he had not sufficiently determined what right the action was brought to try; and lastly, that he had not ordered what should be done by the parties.

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Thesiger and *Ogle* now shewed cause.—With respect to the two first objections, the answer is, that the matters which are now said not to have been determined by the arbitrator were not stated to him in writing, pursuant to his requisition, as points on which he was to adjudicate. Secondly, he had no power to do any thing with respect to the *judgment*, but only to direct how the verdict should be entered. Besides, the defendant, when this rule was moved for, was too late to arrest the judgment. [*Alderson*, B.—The objection upon the record is open on writ of error.] Then as to the objection that the arbitrator has not determined what should be done by the parties, the answer is, that it is very possible, and even probable, that he may not have been able to order any thing to be done by them, these houses being in the occupation of tenants, who were not parties to the reference. Suppose the arbitrator had directed the removal of an encroachment, the defendant's tenant might have sued in trespass all who were concerned in its removal; or, on the other hand, if he had expressly said that nothing should be done by the parties, he could not thereby bind the tenants. Under such a submission as this, if the arbitrator finds, from the complicated relations of the property, that he can do nothing effectually without giving rise to litigation, he has a discretion not to direct any thing, and so not to interfere with the rights of persons not parties to the reference. [*Lord Abinger*, C. B.—Suppose he had said, "I do not think fit to direct any

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thing to be done by the parties," would not that have been sufficient, and is not this equivalent? *Parke, B.*—Might he not have said, that the defendant should do so and so if she could procure her tenant's consent?] That would probably be bad, because conditional, and not sufficiently final.

Peacock, contra.—[*Lord Abinger, C. B.*—The only question really is on the last point.] This submission is upon the express terms that the arbitrator *shall* determine what he shall think fit to be done by either of the parties. The object of a reference is to prevent future litigation; but here the defendant is subject to-morrow to have a fresh notice to remove these rooms, and will be again subject to damages and costs if she do not, while she will be liable to waste if she does. [*Lord Abinger, C. B.*—How could the arbitrator direct any thing to be done which would render the person who did it liable to an action?] He might have directed that the defendant should pay a sum of money in acknowledgment of the plaintiff's right, and that nothing should be done till after her death. In *Morgan v. Smith (a)*, where the costs of the reference and award were to be in the discretion of the arbitrator, who was "to ascertain the same," it was held that he was bound himself to ascertain the amount of those costs, and that they could not be taxed by the Master. [*Lord Abinger, C. B.*—That was a specific thing to be done by the arbitrator.] If, in the present case, the arbitrator had said it was his opinion that nothing further should be done, it would probably have been sufficient; but as it is, he has left the defendant still liable to an action. There is an express stipulation in the submission that he shall say what is or is not to be done. The cases *In re Tribe and Upperton (b)*, *Ross v. Clifton (c)*, and *Wild v. Holt (d)*, are

(a) 9 M. & W. 427.

(b) 3 Ad. & E. 295.

(c) 9 Dowl. P. C. 356.

(d) 9 M. & W. 161.

authorities in favour of the defendant. [*Parke, B.*—The question is, whether it was not obligatory on the arbitrator to make *some* arrangement—that being such as he in his judgment considered fit to be done.]

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Secondly, the arbitrator states that this was an action brought to try a right, and so subjects the defendant to costs, but he does not say what was the right to be tried, or what the wrong done. [*Lord Abinger, C. B.*—That would appear upon the record, either in the declaration or plea.]

Thirdly, being substituted for both the Court and the jury, the arbitrator had power over the judgment as well as the verdict, and ought to have determined the question as to the arrest of judgment. [*Lord Abinger, C. B.*—It is still open to you on writ of error.] The arbitrator ought not to drive the party to another remedy; his decision ought to be final upon everything submitted. The question is not whether this may be determined by another tribunal; *he* is appointed to determine it. [*Parke, B.*—You say the parties have agreed that the costs shall depend upon the event *of the award*. *Alderson, B.*—If the declaration were held bad on a writ of error, the costs would still abide the event.] The arbitrator is to say, whether, upon the whole cause, the plaintiff is entitled to judgment. In *Matthew v. Davis (a)*, a cause was referred in which there was a demurrer to a plea, and the arbitrator having directed judgment to be entered for the defendant on the demurrer, the Court refused on that ground to set aside the award. Here, in the same manner, a matter of law, as well as a matter of fact, was presented to the arbitrator, it being contended that the declaration was bad in point of law, and he being requested to arrest the judgment.

LORD ABINGER, C. B.—The first point for consideration

(a) 1 Dowl. P. C. (N. S.) 679.

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is, whether the arbitrator had authority to order the judgment to be arrested. If we were to determine that he had, we should invalidate almost every award that ever was made. I never heard of any arbitrator ordering the judgment to be arrested, under an order of reference of a cause. The power of entering a verdict is by consent of the parties, and if he is to have authority to enter, and still less to arrest, the judgment, it ought to be by similar consent. No doubt, where a cause is referred, and the determination of it requires that the arbitrator should find upon issues in law as well as fact, he may do so; but that is quite a different case from the present.

The second objection is, that the arbitrator ought to have directed what was to be done by the parties. But surely it would have been nugatory to say, that under the circumstances of the case, neither party had to do anything. The order of reference says he shall direct what he shall think fit to be done by the parties; he does not think fit that anything should be done, and accordingly gives no directions. That implies that he has exercised his discretion on the subject. It is said, it is necessary for him to give some positive direction; to satisfy that, the most trifling act might be contended to be sufficient; the ordering a candle to be lighted and blown out again would be in terms a compliance with the order of reference. I think we may reasonably conclude from the arbitrator's saying nothing on the subject, that he thought nothing was to be done.

PARKER, B.—Several objections have been made to this award, all of which have received a sufficient answer except one, which I think is fatal. The first objection is, that the arbitrator has not decided upon all the matters in difference submitted to him. The matters in difference in the cause are the matters raised upon the issues on the

record, and which are necessary to the determination of the cause. Upon these the arbitrator has decided. If there were other grievances of a more general kind, not in issue in the cause, the party ought, according to the requisition of the arbitrator, to have submitted them to him in writing, and desired him to adjudicate upon them. The second objection is of a similar kind, and may be disposed of in the same manner. As to the third objection, I think the arbitrator had no power to direct the judgment to be arrested. He could not order judgment to be entered for the plaintiff or defendant; so neither could he, under this submission, order it to be arrested. He is put into the situation of the jury, and no more; nothing is said in the order of reference about the judgment; and the only object of referring the cause to him is, that he may direct how the verdict shall be entered. The fourth objection is, that the arbitrator has not awarded what right was in dispute in the cause. But I think he has fully discharged his duty in this respect. The action was brought to decide a particular right; the arbitrator gives a certain sum as damages. He was not bound to state what the right was: although, upon this record, no one can doubt what was the nature of it. With respect to the last objection, that the arbitrator has not directed what should be done by the parties, I am of opinion that upon that ground the award is bad. The words of the order are—"with power to determine what he shall think fit to be done by the parties." Construing it according to its grammatical construction, it gives the arbitrator power to order what he shall think fit to be done, and it was accordingly, as it seems to me, obligatory on him to order something to be done. It resembles one of the cases which have been cited, where authority was given to the arbitrator to say what costs were to be paid; such an authority leaves him no discretion on the subject; he must direct *some* costs to be paid. So here, I think it was obli-

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gatory on him to make some regulation as to the matters in difference. It is said that in reality he had not power to do so, because the defendant's house was in the occupation of a lessee, and therefore she could not enter upon the premises for the purpose of doing anything. But it was competent to him to have directed something to be done if the tenant's consent could be obtained, or at the expiration of the term; or he might have awarded compensation to be made to the plaintiff for the continuance of the injury. The intention of the parties was that all disputes between them should be finally put an end to, but that is not likely to be the case as the matter is left; the plaintiff may bring another action to-morrow for the continuance of the injury. For these reasons, I am of opinion that upon this last ground the award is bad. However, if my lord's construction be correct, that the arbitrator shall give some positive direction if he shall so think fit, but not otherwise, in that case the award is sufficient.

ALDERSON, B.—I agree entirely with my Lord Chief Baron, and also, on all the points except the last, with my Brother *Parke*. In many cases an arbitrator is bound by the order of reference to do something absolutely, the quality and amount of the thing to be done being left to his discretion. This is generally the case in the power given to an arbitrator over the costs. But it seems to me that the present case differs from that; and in my view of the case, the arbitrator is to order something to be done, only in case he thinks anything ought to be done. On the other point, as to the power of the arbitrator to arrest the judgment, I think no doubt can be entertained. If *Mr. Peacock's* argument were well founded, that an arbitrator to whom a cause stands referred, has therefore authority to deal with the judgment, I do not see why there should ever be a stipulation in the order of reference, that no writ of error shall be brought: for as it is fully

established that an arbitrator is absolute judge between the parties, as well of the law as of the facts, and even without such a stipulation, the parties cannot appeal against his determination, he ought to determine whether the judgment is to be arrested or not, and his omission to do so would invalidate his award. On the other hand, if he made any determination as to the judgment, that would of itself have the effect of taking away the writ of error; so that the ordinary stipulation in the order of reference, that no writ of error shall be brought, would be altogether superfluous if the defendant's construction be correct.

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GURNEY, B., concurred.

Rule discharged, without costs.

DOE d. MANN v. ROE.

Jan. 27.

WHITEHURST moved for judgment against the casual ejector. The tenant in possession was in Whitecross-street Prison; the party who went to serve the declaration saw him, read and explained it to him, and was proceeding to read the notice, when he was assaulted by some of the inmates of the prison, had filth thrown on him, and was forced outside the gates; and in consequence he took both the papers with him.—He cited *Doe d. Forbes v. Roe* (a).

What circumstances of obstruction will dispense with the ordinary service in ejectment.

THE COURT granted a rule nisi.

(a) 2 Dowl. P. C. 452.

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MARY WALKER v. GOLLING.

Jan. 30.

Where an action is brought by a feme sole, who marries after the commencement of the suit, but before the trial, it is not necessary to sue out a scire facias, to make the husband a party to the suit.

F. V. LEE had obtained a rule calling upon the plaintiff to shew cause why the fieri facias issued in this cause, and all subsequent proceedings, should not be set aside, on the ground that, the plaintiff having married after the commencement of the suit, her husband had not been made a party to the record by scire facias. The plaintiff declared on the 23rd November; the defendant pleaded on the 1st December; on the 7th December the plaintiff married one John Pollitt; on the 20th, the cause was tried, and a verdict passed for the plaintiff; and on the 4th of January judgment was signed and execution issued.

Miller now shewed cause.—This is not a case in which it was necessary to have a scire facias to make the husband a party to the record. Here the marriage took place before the trial, and at a time when the defendant might have pleaded it in abatement puis darrein continuance. It is only where the marriage takes place after judgment that a scire facias is necessary. The correct rule is laid down in the note to *Underhill v. Devereux* (a), that “if a feme sole obtain judgment, or if judgment be recovered against her, and she marry before execution, a scire facias must be brought by or against husband and wife, in order to execute the judgment.” He referred also to *Cooper v. Hunchin* (b), *Doe v. Butcher* (c).

F. V. Lee, contra.—In the cases cited, no interest was conveyed out of the party by the marriage, the verdict being against the plaintiff. There the husband takes no interest in the verdict; but here a new interest intervenes.

(a) 2 Saund. 72 i, note (4).

(b) 4 East, 521.

(c) 3 M. & Selw. 557.

[*Parke, B.*—Suppose you had known of the marriage before plea pleaded, then certainly you must have pleaded it in abatement, and there would be no occasion for a scire facias. So also, if the marriage take place before the trial, the defendant should plead it puis darrein continuance.] The distinction which has already been suggested is taken in *Tidd's Practice* (a), referring to *Woodyer v. Gresham* (b), *Penoyer v. Brace* (c), *Morgan v. Painter* (d), and *M'Neilage v. Holloway* (e).

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PARKE, B.—The form of the scire facias in the case of husband and wife, as given by Mr. Tidd, after reciting that the wife has obtained a judgment, states that *afterwards* she intermarried; that would seem to shew that the scire facias is necessary only where the marriage takes place after judgment. Where it takes place before the judgment, I think the objection ought to be taken by plea. At all events, we ought not to interfere unless some distinct authority be brought before us, which has not been done.

Lord ABINGER, C. B., GURNEY, B., and ROLFE, B., concurred.

Rule discharged, with costs.

(a) 9th edit. 1114.

(b) 1 Salk. 117.

(c) 1 Ld. Raym. 245.

(d) 6 T. R. 265.

(e) 1 B. & Ald. 218.

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Jan. 30.

Where the lessor of the plaintiff in ejectment, after obtaining a verdict and judgment, delays to tax his costs (although apparently for the purpose of recovering the extra costs in an action for mesne profits), a judge has no authority to order that the defendant shall be at liberty to enter satisfaction on the record, unless the lessor of the plaintiff shall tax his costs within a limited time.

DOE *d.* DRAX *v.* FILLITER.

IN this case the lessor of the plaintiff, who had obtained a verdict and judgment, having delayed taxing his costs, *Rolfe, B.*, made an order at chambers, that the defendant should be at liberty to enter satisfaction on the record, unless the lessor of the plaintiff should tax his costs within a month.

Jervis had obtained a rule nisi for setting aside this order, citing *Doe v. Davis (a)*.

Crowder and Gurney now shewed cause.—The object of the lessor of the plaintiff evidently is to bring an action of trespass for mesne profits, and so obtain his costs of the ejectment, a great part of which are not taxable in the cause. If the costs were taxed, the defendant could pay into Court, in the action for mesne profits, the amount of the profits, and of the taxed costs; but by the course pursued by the lessor of the plaintiff, he is deprived of that advantage. The plaintiff is not entitled to recover, in the action for mesne profits, more than the *taxed* costs; but if he assert that he is, he may still try that question notwithstanding the taxation; *Brooke v. Brydges (b)*. It appears to be clear on the authorities, that the plaintiff in ejectment is not entitled to recover extra costs: *Grace v. Morgan (c)*, *Hodges v. Earl of Lichfield (d)*, *Jenkins v. Biddulph (e)*, *Sandback v. Thomas (f)*, which appears to the contrary, was overruled in *Grace v. Morgan*. In *Nowell v. Roake (g)*, the plaintiff in ejectment was held to be entitled to recover the costs incurred by him in a court of error; but that case is

(a) 1 Esp. 358.

492.

(b) 7 Moore, 471.

(c) 4 Bing. 160; 12 Moore, 390.

(c) 2 Bing. N. C. 534; 2 Scott,

(f) 1 Stark. N. P. C. 306.

790.

(g) 7 B. & C. 404; 1 Man. &

(d) 1 Bing. N. C. 500; 1 Scott, Ry. 170.

distinguishable, inasmuch as costs could not be awarded by the court of error, and they were therefore held recoverable as part of the damages. *Symonds v. Page* (a) only decides that the costs may be recovered (in an action for mesne profits), although they have not been taxed. It is true that in *Gould v. Barratt* (b), it was held, in an action for a malicious arrest, that the plaintiff might recover costs in the former suit beyond his taxed costs; but that is only a *nisi prius* decision, and cannot weigh against the other authorities which have been referred to. [*Parke, B.—Sinclair v. Eldred* (c) and *Webber v. Nicholas* (d) are authorities the other way.—*Lord Abinger, C. B.*—I should certainly have thought that the case of all others where the plaintiff should recover *all* his damages.] The only *legal* consequence of the wrongful withholding of the land is the costs given on taxation. [*Parke, B.*—Costs are supposed to be taxed on the principle that the party is thereby fully indemnified all that he has fairly incurred. *Alderson, B.*—All that it is reasonable the attorney, without special orders from his client, should incur.] If however the lessor of the plaintiff is fairly entitled to more, this order will enable him to raise the question.

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Jervis (with whom was *Hodges*), *contra*.—The objection is, that the learned Judge had no authority to make any such order. The defendant might perhaps have applied for and obtained an order to have the bill of costs delivered; but the present order amounts to this, that if the party does not come in and tax his costs, the statute of Gloucester shall be repealed. No action for mesne profits has yet been brought or threatened, nor any steps taken to shew that the lessor of the plaintiff intends to tax his costs. The

(a) 1 C. & J. 29.

(b) 2 M. & Rob. 171.

(c) 4 Taunt. 7.

(d) Ry. & M. 419; 4 Bing. 16.

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order does not even provide for an undertaking on the part of the defendant to pay the costs when taxed: no price is paid for the obligation imposed on the other party. [He was then stopped by the Court.]

LORD ABINGER, C. B.—There certainly seems no authority for making such an order as this, and that was the ground on which the present rule was granted.

PARKE, B.—I am of the same opinion. I think, however, that the defendant should try the experiment of an application for a judge's order upon the lessor of the plaintiff to deliver his bill of costs, and then he may tax upon that. There ought certainly to be some mode of enabling the defendant to pay the taxed costs.

ALDERSON, B.—When the action for mesne profits is brought, there is no difficulty, because then particulars of the demand must be delivered, or the proceedings will be stayed.

GURNEY, B., concurred.

Rule absolute (a).

(a) See *Hathaway v. Barrow*, 1 Camp. 151; and *Doe v. Huddart*, 2 C., M., & R. 316.

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THOMAS v. The MAYOR, ALDERMEN, and BURGESSES of
the Borough of Swansea (a).

Jan. 31.

CROMPTON, for the defendants, moved for a rule to shew cause why the Master's taxation in this cause should not be reviewed. It was an action on an attorney's bill; after action brought, the defendants obtained an order to tax the bill, and after the taxation the defendants paid the amount found due by the Master into Court; the plaintiff took the money out of Court, and taxed the costs of the cause, and the Master allowed the plaintiff the costs of taxing the original bill, as costs in the cause. *Crompton* contended that these were not costs in the cause. The case of *Harbin v. Miles* (b) only decided, that under an order to tax an attorney's bill, obtained after action brought, the defendant could not have the costs of the taxation; but there was no case which determined that the plaintiff was entitled to such costs as costs in the cause.

Where an order is obtained to tax an attorney's bill, after action brought thereon, and the defendant then pays the amount found to be due into Court, which the plaintiff takes out, the costs of the taxation of the bill are rightly taxed to the plaintiff as costs in the cause.

ALDERSON, B., held, that the Master had rightly taxed the costs; that on the taxation of the bill, he was only in the place of the jury, to ascertain the amount, and that they must on principle be costs in the cause, whichever way the verdict might ultimately be.

Rule refused.

(a) Before *Alderson, B.*, sitting alone.

(b) 9 B. & Cr. 755.

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Jan. 12.

LAWRENCE PHILLIPS, SAMUEL PHILLIPS, and C. LARRIEU
v. CLAGETT.

An action having been brought against the defendant for illegally pledging certain quantities of tobacco, and the defendant having pleaded a release given to him by one of the parties interested in the tobacco, the Court refused to set aside the plea, the releasor having an immediate interest in the money sought to be recovered, and no fraud being shewn.

Quære, whether a Court of Equity would under such circumstances set the release aside?

A court of law has no jurisdiction to set aside a release which is good in law, but in the exercise of its equitable jurisdiction it may interfere to prevent a defendant from pleading a release, where it would be a manifest fraud on a third party seeking to enforce a demand against the defendant, and where the defendant himself is a party to the fraud.

THIS was an action on the case for illegally pledging and converting several parcels of tobacco which belonged to the plaintiffs and Lewis Rogers and James Gray jointly.

The defendant having obtained a rule to plead several matters, and amongst others pleas of release to different counts in the declaration, the plaintiffs obtained a rule calling upon the defendant to shew cause why the pleas of release should not be struck out, and the rule to plead several matters amended accordingly, on the ground that the release was fraudulent. The affidavits on which the rule was granted disclosed the following facts:—

Prior to the year 1836, 2940 hogsheads of tobacco had been purchased in the United States on a joint adventure of the plaintiffs and Rogers and Gray, in order to be sent to France; but the contracts with the French Government having failed, an arrangement was made whereby Rogers and Gray became possessed of 868 hogsheads, and the remaining 2072 hogsheads were sent to a person of the name of Warwick (a tobacco merchant in London) for sale, upon the terms that he should make advances thereon. In the course of the year 1836, Warwick was also in possession of certain other large quantities of tobacco furnished by Rogers and Gray on the joint adventure of themselves and the plaintiffs L. and S. Phillips, for the purchase of which Warwick had made large advances. In August, 1836, the defendant Clagett, who had retired from business many years before, was applied to by Warwick to enter into partnership with him in the business of a tobacco merchant, the latter representing himself to be a man of considerable property, and stating to the defendant that he required no

capital with him, but was desirous of having his assistance in the sale department. The defendant went into Warwick's counting-house in September 1836, and sometime afterwards agreed to join him in partnership from the 1st of October 1836, upon an agreement that he the defendant should not be entitled to share in any profit or be liable to any loss in respect of any tobacco then in the possession or under the control of Warwick, and that he should have no interest whatever in any commissions or profit to be derived from the sale of any portion of the said 2072 hogsheads of tobacco. In the latter part of November, 1836, negotiations took place between the Phillipses, on behalf of themselves and the other plaintiff Larrieu, and Clagett on behalf of Rogers and Gray, with the view of ascertaining the exact shares and proportions of the plaintiffs and of Rogers and Gray in the said 2072 hogsheads, and the result was that an agreement was entered into in the beginning of December, 1836, that Rogers and Gray should retain possession of the 868 hogsheads, and be interested in 234 hogsheads, parcel of the 2072 hogsheads. No actual division took place. In February 1837, the plaintiffs discovered that in the autumn of 1836 dock warrants had been taken out and pledged for the whole 2072 hogsheads of tobacco, and shortly afterwards Warwick and Clagett stopped payment, solely on account of Warwick's liabilities previous to the partnership. In May 1837, a fiat in bankruptcy was issued, and in the following September the defendant obtained his certificate. Several actions were brought against the parties with whom the tobacco had been pledged, in which the defendant, at the request of the Phillipses, was mainly instrumental in effecting advantageous compromises, and in July 1839, the defendant had several interviews with Rogers, who stated to him that he was advised that his (the defendant's) certificate would not discharge him from his liability in respect of the illegal pledging of the tobacco, and proposed to give him a release against all claims in respect thereof, which was accordingly executed by Rogers, without any express

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authority from the plaintiffs. At the time of its execution, and subsequently, one of the Phillipses had been in communication with the defendant, and had had several interviews with him respecting the said actions; but it did not appear that the defendant had ever informed Phillips of the existence of the release. In January, 1842, the plaintiff Larrieu met Rogers at Paris for the purpose of arranging accounts, and it was then agreed between them that Rogers and Gray should give up to the plaintiff all their interest in the said 234 hogsheads, and should concur in any proceedings against the defendant for the recovery of the surplus value of the said tobacco, but no mention was made to Larrieu by Rogers of the release to the defendant. The defendant's affidavit denied in the strongest manner every imputation of fraud, and stated that the present action was commenced in 1842, without any previous intimation to the defendant, or any idea on his part of an intention to proceed against him.

Kelly and Sir *John Bayley* shewed cause.—There was no fraud whatever in this case, and the circumstances disclosed in the affidavits do not warrant the inference sought to be drawn, that there was any collusion whatever between the defendant and Rogers. As there never was any division of the 2072 hogsheads of tobacco amongst the parties interested in the transaction, Rogers was a party having a joint interest therein with the plaintiffs, and was competent to grant the release, which was therefore valid in point of law. And the Court cannot set it aside, unless a clear case of fraud be established; and there is none such in the present case. These pleas, therefore, must be allowed to remain upon the record. The cases of *Payne v. Rogers* (a), *Legh v. Legh* (b), *Hickey v. Burt* (c), *Mountstephen v. Brooke* (d), *Innell v. Newman* (e),

(a) Doug. 407.

(b) 1 Bos. & P. 447.

(c) 7 Taunt. 48.

(d) 1 Chit. 390.

(e) 4 B. & Ald. 419.

Manning v. Cox (a), *Barker v. Richardson* (b), and *Johnson v. Holdsworth* (c), where the Courts refused to allow a release to be set up, were all cases in which there was either a plain and manifest fraud, or an attempt to defeat the real plaintiff by collusion with a mere nominal party who had no real interest in the subject-matter of the suit; and in which the Courts so decided upon one or other of those grounds. But on the other hand, there are many cases in which the Courts have refused to interfere. In *Arton and Dowson v. Booth* (d), the plaintiffs were in partnership from 1814 to 1816, when the partnership was dissolved; and by the terms of the partnership-deed, Arton was to receive and pay all debts due to and from the partnership, and Dowson was not to interfere. Previously to the dissolution, the defendant was indebted to both the plaintiffs in 8*l.* for work done by them, and was afterwards informed by Arton that he alone was entitled to receive the money according to the terms of the partnership. Subsequently the defendant was applied to by Arton to pay the money, and on his refusal, an action was brought in the names of Arton and Dowson: to which the defendant pleaded a release from Dowson. The Court were of opinion that the plea ought to be allowed to stand; and *Dallas*, C. J., said—"It is quite clear that one plaintiff may release a cause of action brought by two, and therefore the Courts have laid it down as a leading principle, that a release may be set aside if there be fraud between the parties, but that the party applying must make out a very strong case of fraud." So, in *Herbert v. Pigott* (e), which was an action brought by two out of four executors, and the two who were not joined in the action released the defendant, who pleaded the release *puis darrein continuance*, the Court refused to set aside the plea, the

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(a) 7 Moore, 617.

(b) 1 Y. & J. 362.

(c) 4 Dowl. P. C. 63.

(d) 4 Moore, 192.

(e) 2 Cr. & M. 384.

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plaintiffs having failed to make out a case of fraud; and Bayley, B., there said—"The executors who have given the release ought to have been co-plaintiffs, and I think it must be taken as if they were; and then the case of *Jones v. Herbert* (a) decides that a plaintiff, who applies to set aside a release given by a co-plaintiff puis darrein continuance, must make out a very strong case of fraud."—So also, in *Crook v. Stephen* (b), the Court of Common Pleas decided that they would not, on a summary application like the present, set aside a release given to a defendant by one of two co-plaintiffs, unless fraud between the releasor and the defendant was clearly established. And in a recent case in this Court, of *Wild v. Williams* (c), the same rule was acted on, and it was there held, that fraud on the releasor was no ground for setting aside a plea of release. [Parke, B.—The only point is, whether the release is fraudulent; if it is not, the pleas must be allowed to stand.] A Court of law will not interfere except in a case of indisputable fraud.

The Solicitor-General (Sir W. W. Follett), *Crompton*, and *Waddington*, in support of the rule.—It is clear that the party releasing must have an interest, but it is not every person who has an interest in the subject-matter of a suit that has authority to bind his copartners by a release, and for more than a century the Courts have exercised their authority in cases of this sort. In this case, which is an action of tort, the plaintiffs sue as tenants in common, and Rogers would have no interest in the damages recovered; for there are several authorities to shew that these plaintiffs can recover only in respect of their own interest. *Addison v. Overend* (d), *Sedgworth v. Overend* (e). [Parke, B.—Here there was no separation of the tobacco,

(a) 7 Taunt. 421.

(b) 5 Bing. N. C. 688.

(c) 6 M. & W. 490.

(d) 6 T. R. 766.

(e) 7 T. R. 279.

and consequently Rogers and Gray would continue interested in three-eighths, and the plaintiffs would still be interested in the 868 hogsheads. Rogers and Gray would not cease to be interested until the division was actually made.] In *Legh v. Legh (a)*, *Buller, J.*, says—

“There are many cases in which the Court has set aside a release given to prejudice the real plaintiff. All the cases depend on circumstances. If the release be fraudulent, the Court will attend to the application.” The Court here is dealing with its own action, and not with the release itself. The question is, whether the plea is to be allowed under the circumstances, to the prejudice of the plaintiffs in this action. In *Herbert v. Pigott, Bayley, B.*, says—“A release may be most unjust, and if the Court sees that it is so, they will interfere.” In *Barker v. Richardson, Hullock, B.*, says—“The Courts have exercised the jurisdiction sought to be enforced in this case on several occasions, since the case of *Payne v. Rogers*, in which the Court set aside a release given by a tenant, in whose name a landlord had instituted proceedings for an encroachment on his common.” It is clear that if two partners commence an action, one may release the subject-matter of it, and that if there be no fraud to induce the Court to interfere and set aside that release, it will be binding upon the other plaintiff, and operate as a bar to the action. Mr. Justice *Buller*, in the case of *Legh v. Legh*, says, that “there are many cases in which the Court has set aside releases given to prejudice the real plaintiff; and in all cases where the release so given is fraudulent, the Court is bound to interfere. Now in this case, *Barker*, who is the real plaintiff by the terms of the dissolution, was to collect the debts due to, and satisfy the claims upon, the partnership, and the other plaintiff, *Owen*, had by the agreement relinquished all interest in the debt, of which the defendant was fully aware. Fraud

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cannot be inferred, but must be clearly shewn by the affidavit of the party seeking to set aside the plea: that was the principle upon which the cases of *Arton v. Booth* and *Furnival v. Weston*, and the other cases cited for the defendant, proceeded. But in this case no one can doubt that the defendant was privy to the fraud. He knew of the dissolution of partnership, and the terms upon which it was dissolved; and, when the payment of this debt was demanded, made no claim of set-off, but subsequently, with a full knowledge of the facts, took a release from Owen. The whole case is so pregnant with fraud, that we should not do justice between the parties were we not to interfere and set aside the plea in this stage of the proceedings." In the present case there was the same species of fraud; for the defendant concealed the existence of the release from the plaintiff, S. Phillips, with whom, at the time it was executed, and afterwards, he was in constant communication. He withheld all knowledge of it also from Larrien. These facts are sufficient to shew such fraud as will induce the Court to interfere. Most of the cases mentioned on the other side were cases of actions of contract, in which the whole sum would be recovered, and not of tort, where the other party might recover damages for the injury to his share of the property. [*Alderson*, B.—That observation rather applies to the validity of the plea. *Parke*, B.—The plea in effect would go to all the damages sustained by all or any of the parties.] Only where the action is in contract. But the defendant's counsel were wrong in saying that the cases where the Courts had refused to allow a release to be set up, were cases in which the party had no interest, for the party must have had the legal interest, otherwise the plea would not have been available. The term "fraud," as applied to this subject, does not mean a corrupt agreement, but includes every case where a person takes upon himself to deal with the rights of others clandestinely and surreptitiously; and such

a case of fraud, by concealment of the transaction by the defendant and Rogers, is clearly made out. In an equitable view of the case, Rogers has no interest whatever, and is therefore out of the jurisdiction of a Court of equity. The rule, for these reasons, ought to be made absolute.

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Lord ABINGER, C. B.—It has been the practice of Courts of law (especially in modern times), where they see that justice requires the interference of a Court of equity, and that a Court of equity would interfere—in every such case to save parties the expense of proceeding to a Court of equity, by giving them the aid of the equitable jurisdiction of a Court of common law, to enable them to effect the same purpose. From that principle has arisen the interference of Courts of common law in many of the cases which have been cited, where they have prevented a plea of release, or any other matter of the same sort, from being pleaded; and where they have seen clearly and distinctly that a Court of equity would declare the release to be void, they set the release aside, in order to save the parties the necessity of having recourse to a tedious, and certainly sometimes an expensive, litigation. But those are cases where without doubt they would not have allowed the release to be set up.

In the cases cited, whether the release has been given by one party in fraud of another and in collusion, or whether by a mere nominal plaintiff having no interest whatever in the subject-matter of the action, or under other circumstances of the same character, which perhaps may be found in other cases, the ruling principle which has governed the Courts has been, that it has appeared manifest that a Court of equity could do nothing else but set the release aside. Now in this case the releasor himself had an immediate interest in the money to be recovered in this action, or any other action of the same sort that could be brought—there had been no final arrange-

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ment to separate his interest, and to give him only an interest in three-eighths of the tobacco; and therefore that is a distinction in this case which is not to be found to the same extent in any of the cases cited. But I have come to the opinion, that we ought not to make this rule absolute, on another ground, which is the very considerable doubt I entertain whether a Court of equity would set this release aside. I do not pronounce any opinion as to whether it would or would not: it is sufficient to say that I entertain considerable doubt whether a Court of equity would so decide. It might be essential, in order to determine that point, to know the precise state of the accounts between Rogers and others of the co-partners in this transaction, and the precise extent to which Clagett had assisted Rogers and the plaintiffs in recovering from other persons the sums, which it seems they have recovered in other actions, arising out of this transaction. And various other circumstances combine to create serious doubts whether under the circumstances a release was not reasonable. Moreover, I cannot but observe that this action is brought at a period when the Statute of Limitations was almost exhausted, so that it seems the parties have slept upon their rights, as to the action, for so many years, that they themselves give a sort of judgment that they thought Mr. Clagett at least ought to be spared. The parties proceed criminally against Warwick, who eludes the justice of the country;—they then proceed against other parties who received part of these goods from Warwick, and they recover in some of the actions; in others they effect a compromise. It is suggested that Mr. Clagett gave them assistance in their inquiries for this object; and suppose the parties to have said, “This is a case of hardship against Mr. Clagett, and as he has done so much for the benefit of the parties interested, we ought not to proceed against him;” would there be any thing unreasonable in it? and suppose the opinion of one of the parties interested proceeds really

bond fide to that extent, and he gives him a release, I am not prepared to say that that release is void; I am rather induced to think the other parties ought to do the same thing; and if that is my opinion upon a consideration of all the facts, I cannot set that aside which has been done by one of them. Taking all the circumstances together, I think it is by no means clear that a Court of equity would set aside this release unconditionally and without terms, so as to justify a Court of law, in the exercise of its jurisdiction, in making this rule absolute. Under all the circumstances, therefore, I think we ought not to press our jurisdiction so far as to set this plea aside, and that this rule must be discharged.

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PARKE, B.—I entirely concur with my Lord Chief Baron, that in this case we ought not to interfere to exercise the equitable jurisdiction of the Court by preventing the defendant from pleading these pleas. The cases cited clearly establish that the Court may exercise an equitable jurisdiction for the purpose of preventing the defendant from pleading pleas of release, where the release is valid in point of law, but invalid in equity, as being a fraud for which the defendant is answerable. The Courts have, in numerous cases which have been cited, properly exercised that jurisdiction by setting aside the plea of a release: it seems in some of the cases they have done more than that, for they have set aside the release itself. I apprehend that to have been *per incuriam*, for I cannot understand what authority the Court has to do that,—all they can do is not to allow the release to be pleaded. If such a release is a fraud in point of law upon one of the parties to it, the Court would not interfere; *that* is the proper subject for a replication; they can only interfere when it is a fraud on third persons, and when a Court of equity would clearly set aside the release, not merely as between the parties one of whom releases,

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but where they would set it aside as against the defendant. In order to call upon the Court to exercise its equitable jurisdiction, it must be made out manifestly and clearly that there has been a fraud by some person upon the plaintiff seeking to enforce the demand, and that the defendant was a party to that fraud. Unless that can be made out manifestly and clearly, this Court ought not to interfere. It is said that this is a case in which a Court of equity would interfere to set aside the release, but I am by no means prepared to say that the case is such that a Court of equity would so interfere. I take it to be clear that one partner (and Rogers, as far as regards this transaction, was a partner with the others) has a clear right to receive or release a debt, subject to his responsibility to his partners, unless in a case where he has expressly or impliedly bargained and disposed of that right to his other partners. There are many cases which have been cited, particularly that of *Barker v. Richardson*, in which, where the plaintiff has agreed with others that they are to be substantially interested in a debt, and where the defendant is a party to the fraud, and receives the release knowing that the person who gives it is in that situation, it has been held that the Court will set it aside. That is not the present case, because it does not appear on these affidavits that there has been any bargain by which Rogers has parted with the right which he would have, independently of any rights of his own, to receive or release the proceeds of the subject-matter in which the parties were jointly interested. It appears that there was a negotiation in the course of the year 1836, in which it was contemplated that there should be an end of the partnership; that negotiation was certainly not carried into effect, and after it took place it appears clear that Rogers continued to be interested, either to the extent of the original three-eighths, or at all events to the extent of that proportion after deducting the 868 hogsheads of

tobacco which were received by Rogers abroad. To some extent he had an undivided interest, and by virtue of that undivided interest he had as much right to receive the proceeds or damages for misapplication of the tobacco as the other parties had, and I cannot find anything in these affidavits to shew that he himself, as a co-partner, has parted with that original right which he so had. I do not think this is a case in which we ought to interfere. Perhaps it may not be correct to say, (and in that I agree with the *Solicitor-General*,) that in all cases in which a party has an interest he may release,—that is not perhaps correct,—it is correct to say, that if he has parted with all interest, in that case he cannot release. One of the cases cited by the *Solicitor-General* was a case where the partner agreed with his co-partner that the latter should receive all the debts due to the co-partnership, and pay the debts of the co-partnership: in such a case he has disposed of his right to release the debts, although he has an interest in the ultimate surplus. I quite agree that where a person, under such circumstances, executes a release to a party cognizant of the situation in which he stands, that is a case in which a Court of equity would interfere, and it is a case in which this Court, in the exercise of its equitable jurisdiction, would interfere to prevent the defendant from pleading the release. But it appears to me that in the present case it is extremely doubtful whether there has been any fraud committed at all by Rogers or his co-partner: certainly not any fraud to which the defendant was a party.

Upon the whole, therefore, I think that this is not a case in which the Court ought to interfere. The judgment of a Court of law is final and conclusive, because there is no power of appealing from it. In all these cases the Court therefore properly confine themselves to simple, clear, and manifest cases, about which there cannot be the slightest doubt that equity would relieve. At present it is sufficient to say that this does not appear to be such a case.

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ALDERSON, B.—I agree that this rule ought to be discharged. The Court only interferes in a plain case, where the act done in releasing the debt is clearly in fraud of the plaintiff, or contrary to some agreement between him and the releasor. Where the party is an interested party, and where by the law all persons having a joint interest have a right to release and to dispose of the debt, how is his acting on that right which the law gives him as arising out of his interest, a fraud? Then what other ground exists in this case except that? It seems to me that there is none, and that even if there were,—if fraud were made out,—it is not traced to the defendant. It is not only necessary that it should be a fraud on the party injured, but it also should be shewn that the defendant is cognizant of it, so as not to be in the situation of an innocent party. There is nothing here to shew that the defendant was cognizant of the fact. Supposing that, however, to be a matter of doubt, upon the other ground it seems to be perfectly plain, that here the party releasing had an interest in the transaction, and an interest to have the proceeds of the goods just as much as the plaintiffs, and had the right, therefore, innocently of releasing. In all cases where one partner releases the debt due to himself, that does, to a certain extent, injustice towards the other partner, because the other partner would have the benefit of the debt if it were recovered. This is no more than that case.

On these grounds, it appears to me that this release ought to stand, and that the plea ought to be allowed.

GURNEY, B., concurred.

Rule discharged.

BURMESTER and Another v. HOGARTH.

ASSUMPSIT on a bill of exchange.—The second count of the declaration stated, that theretofore, to wit, on &c., the defendant made his bill of exchange, and then and there directed the same to one J. Bone, and thereby required the said J. Bone to pay to the order of him the defendant, six weeks after the date thereof, 187*l.* 15*s.*, and then indorsed the same to the plaintiffs. There was also a count upon an account stated.

The defendant pleaded to the second count, that he did not make or indorse the said bill; and to the count upon the account stated, non assumpsit.

At the trial before Lord *Abinger*, C. B., at the last Summer Assizes for the county of Surrey, it appeared in evidence, that on the 19th of June, 1841, the plaintiffs, who were managers of the London and Westminster Bank, discounted a bill drawn by one Finden and indorsed by the defendant, which bill was dishonoured when it became due: that, on the 22nd of September, Finden drew the bill the subject of the present action, but did not indorse it; but that, after it had been indorsed by the defendant in blank, he, Finden, carried it to the bank, where it was received in renewal of the dishonoured bill. It was contended for the defendant, that the issue alleging that the defendant *made* the bill was not supported by the evidence, and the learned Judge, being of that opinion, directed the jury to find a verdict for the defendant, giving the plaintiffs leave to move to enter a verdict. *Shee*, Serjt., having in Michaelmas Term obtained a rule accordingly,

Thesiger now shewed cause.—The second count of the

the present indorsement, being in blank, was equivalent to the drawing of a new bill payable to bearer, and therefore the bill was misdescribed in the declaration; 3rdly, that the plaintiffs were not entitled to recover on the account stated.

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A declaration alleged that the defendant *made* his bill of exchange, and directed the same to J. B., and required him to pay to the defendant's order 187*l.* 15*s.*, and then *indorsed* the bill to the plaintiffs. It appeared that the bill had been drawn by one F., and indorsed by the defendant in blank, and having been delivered by the defendant to F., was by him taken to a bank of which the plaintiffs were the managers, where it was received by them in renewal of another bill discounted by them, and drawn and indorsed by the same parties:—

Held, 1st, that proof of the defendant's being the *indorser* of the bill did not support the averment that he made the bill; 2ndly, assuming that an indorser might be treated as a drawer, still

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declaration was not proved; for the defendant was merely the indorser, and not the drawer of the bill. There is a distinction between the maker of a promissory note and the indorser of a bill of exchange. In the case of a note, the maker stands in the situation of an acceptor of a bill, and is primarily liable, but an indorser is not liable except through the indorsement by him. It is true that an indorser in some respects resembles a new drawer, but it has never yet been decided that he is liable both as drawer and indorser. In *Penny v. Innes* (a), where it was held that the defendant's indorsement constituted a new drawing by him, the payee had indorsed the bill to the plaintiffs, and after that indorsement the defendant indorsed it, and then the plaintiffs indorsed it: and Lord *Lyndhurst*, C. B., said—"The indorsement of this bill by the defendant gave it all the effect of a new instrument as against him, though it did not in fact create a new instrument." *Gwinnell v. Herbert* (b), however, shews that he cannot be considered as a new drawer in all respects. There the note was signed by Herbert Herbert, and indorsed by the defendant Edward Herbert. And *Littledale*, J., says—"The declaration here charges Edward Herbert as the maker of the note. It must be taken that in point of fact the note was made by Herbert Herbert; then the question is, whether he is discharged, and a new instrument created by Edward Herbert's name being put on the back of the note. I cannot understand how that should be so. It is said that, in the case of a bill of exchange, every indorser is a new drawer. But even that requires qualification. Bills are drawn according to the custom of merchants all over the world; and merchants would be much surprised at being told that an indorser might be considered a new drawer in all respects. It may be correct to say, that an indorsement of a bill is in the nature

(a) 1 C., M., & R. 439. (b) 5 Ad. & Ell. 436; 6 Nev. & Man. 723.

of a new drawing." If the defendant is to be considered as a new drawer, he cannot also be considered as an indorser at the same time. [He was then stopped by the Court.]

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Shee, Serjt., *Butt*, and *E. James*, in support of the rule.—The question is, what is the meaning of an indorsement in the English law? It is the mere writing of the name upon the bill: but by so doing the party does that which amounts to both a drawing and indorsing. [*Parke*, B.—Can that be so? It is one act only. It cannot be both a drawing and an indorsing.] An indorser does not take upon himself any one liability other than what a drawer takes upon himself; therefore an indorser is in effect a drawer. In *Allen v. Walker* (a), *Alderson*, B., says—"The plea is, that the defendant did not make or draw the bill of exchange, as in the first count alleged. Now, the manner in that count alleged is by indorsement. That is a traverse, and the plea cannot be treated as a nullity." By the law of France, also, drawing is considered the same as indorsing. And in *Ballingalls v. Gloster* (b), Lord *Ellenborough* says—"There is no distinguishing the case of an indorser from that of a drawer, it having been long ago decided that every indorser is in the nature of a new drawer, every indorsement as a new bill, and that the indorser stands as to his indorsee in the law merchant the same as the drawer." Every indorsement is therefore a new drawing. [*Alderson*, B.—It is not the same bill. It is the drawing of a new bill that it amounts to.] It does not follow, because the indorsing of the bill makes it payable to bearer instead of to order, that it is therefore a different instrument. When a man draws a bill payable to a third person, he does that which, when he draws a bill payable to his own order, he does by indorsement. A blank indorsement is a mere expanding of the contract into which the drawer and

(a) 2 M. & W. 318.

(b) 3 East, 482.

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indorser enter, to pay if the acceptor does not. [*Parke*, B.—But you cannot say that the one act is the act of drawing and indorsing also. You cannot make it two acts. The holder may treat it as a drawing or an indorsing, but it cannot be both.] At all events, there is evidence of an account stated between the indorser and indorsee. The indorsement is an admission pro tanto that so much is due, for there is a privity between the plaintiffs and the defendant. In *Watkins v. Wake* (a), it was held that debt was maintainable on a bill of exchange by an indorsee against his immediate indorser.

LORD ABINGER, C. B.—I am of opinion that this rule ought to be discharged. The defendant cannot be considered as both drawer and indorser; and supposing that he could, I think the bill is not correctly described; for if in point of law this indorsement constituted a new drawing, it would be a new drawing of a bill payable to *bearer*, and therefore it is misdescribed when it is stated to be payable to the defendant's order.

PABKE, B.—I agree with my Lord that the rule must be discharged. In the first place, assuming that the indorser of a bill may be treated as the drawer, the indorsement in this case, being in blank, was equivalent to the drawing of a new bill *payable to bearer*; but the declaration describes the bill as payable to *the order* of the drawer, which is different in substance. In the one case, any one who was the holder of the bill by delivery, would be entitled to the money specified in it; in the other, that person only who should be indicated by a fresh act of the drawer, ordering the money to be paid to him. In some of the cases on the subject it has happened that the indorsement, which has been treated as an act of drawing,

(a) 7 M. & W. 488.

has been in blank ; but the objection that the drawer should have been stated to have made the bill payable to the bearer, has never been brought forward.

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In the second place, there were two issues, one whether the defendant drew, the other whether he indorsed, a bill payable to the drawer's order. There are two different acts alleged on the record. I do not think it possible that the single act of indorsing should be proof of both. It is true that the holder may treat the indorser as the drawer of a new bill, or as the indorser of the old bill, but he cannot treat him as both.

Then as to the right of the plaintiffs to recover on the account stated ; although the indorsement of the bill, in an action by the indorsee against the indorser, may be *primâ facie* evidence of an account stated, yet on the facts in proof in this case, that *primâ facie* evidence was rebutted, and it is shewn that there was no account stated between the parties. In a late case, *Lewin v. Edwards (a)*, we held that, although *primâ facie* the action of debt would lie on a bill of exchange by indorsee against indorser, yet where it appeared on the pleadings that the indorsement was in blank, and the bill, being made thereby payable to bearer, was handed over by the indorser, and so no privity existed between the indorsee and indorser, the action was not maintainable. I think, therefore, that the count on the account stated is not supported by the evidence.

ALDERSON, B.—I am of the same opinion. We ought to construe the averments in the declaration according to their plain sense and meaning, and then they import a drawing as one act and an indorsement as another. Here one act only is proved to have been done, which my brother *Shee* contends may be treated as either the one or the other ; but admitting that argument to be well founded,

(a) 9 M. & W. 720.

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it cannot be treated as both; and therefore the plaintiffs must fail on that point. The indorsement is not a drawing of the same bill, but of a bill payable to bearer. It seems to me, therefore, incorrect to describe an indorsement as a new drawing of the bill; and if that be so, there is a difference between the drawing and indorsing of a bill. But then it is said this indorsement was evidence of an account stated. It is true, as between the immediate parties to it, a bill is evidence of an account stated; but here the parties were not immediate: there was an intermediate party, namely Finden, who carried the bill to the bank and got credit for it; and therefore the indorsement cannot be evidence of the account stated.

Rule discharged.

Jan. 17.

WINDHAM v. FENWICK.

The description of the residence of the defendant in a writ of summons is immaterial.

IN this case *Barstow* applied to set aside an alias writ of summons, on the ground of a variance between the alias and the original writ. The defendant had been described in the first writ as "of ———, in the county of York," but the blank had been filled up by *Parke*, B., on a summons, with the word "Waghen." The alias writ described the defendant as "of Brooke in the Isle of Wight, in the county of Southampton, and late of Waghen, in the county of York." It was sworn that the defendant never had lived in the county of York.

PARKE, B.—The statute only requires the writ to state the place and county of the residence or *supposed* residence of the defendant, or wherein the defendant shall be or shall be *supposed* to be. The description is therefore immaterial—he may be *supposed* to have lived there.

Motion refused.

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A WRIT of summons, dated the 6th day of August, was served on the defendant at half-past twelve P. M., on the 6th day of December following. Two days afterwards a summons was taken out, calling upon the plaintiff to shew cause why the copy of the writ of summons and the service thereof should not be set aside; and on the hearing of the summons by *Rolfe, B.*, it was ordered to be discharged with costs, his Lordship being of opinion, that as there was no proof of the writ of summons having been issued before half-past twelve o'clock, the service might have been effected within four months afterwards. *Martin* afterwards obtained a rule calling on the plaintiff to shew cause why the service of the writ of summons should not be set aside with costs, and why the order of *Rolfe, B.*, should not be rescinded, and the costs paid under it refunded, on the ground that the writ had not been served within the period prescribed by the stat. 2 Will. 4, c. 89.

Where a writ of summons is not served until after four calendar months from the date of it, the proper course is for the defendant to apply to the Court to set it aside, and not to treat it as a nullity.

Fortescue now shewed cause.—The words of the 10th section of the statute are, “that no writ issued by authority of this act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date.” If the writ was served too late, it was of no use to apply to the Court, for in that case the writ, being a nullity, is of no force whatever, but a mere piece of waste paper. And as the plaintiff has taken no step upon it, the defendant was not called upon to do so. It would have been time enough to have come to the Court when the plaintiff took any step upon it. [Lord *Abinger*, C. B.—As you have served it upon the party, he may come to set it aside.] Here the writ is void on the face of it, for it bears the memorandum directed by the statute, which

Esch. of Pleas, requires the service to be within four months, including the day of the date thereof.

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v.
WARREN.

Martin, contra.—The learned Judge having held the service to be regular, it is too much now to come here and say it is altogether a nullity. But the Lord Chief Baron has given a full answer to the objection, by saying, that as the plaintiff has served the writ, the defendant has a right to come here to set it aside. Suppose the defendant disregarded the service, the plaintiff probably would, on an affidavit of service, enter an appearance for the defendant and declare; and then, on coming to the Court, the defendant would be met by the objection that the application was too late, inasmuch as two steps had been taken.

PER CURIAM.—This is just the kind of case in which a defendant ought to come to the Court.

Rule absolute.



Jan. 21.

WILLIAMS v. MORTIMER.

The Court refused to allow an affidavit to be read which was sworn after the first four days of the term, in support of a rule obtained upon it for a new trial, although the rule had in fact been obtained after the affidavit was sworn, in consequence of the motions for new trials extending beyond the four days.

THERE being more motions for new trials than could be heard within the first four days of Michaelmas Term last, a list was made, on the evening of the 4th day, of those which remained to be moved, and amongst others this cause was entered, but it was not in fact moved until the 9th of November, when *E. V. Williams* obtained a rule nisi, which was drawn up on reading certain affidavits.

Chilton, on shewing cause, took an objection to the reading of one of the affidavits, on the ground that it had been sworn after the first four days of the term, viz. on the

7th of November. The rule could not have been obtained after the first four days had expired, unless the case had been entered in the list, and that entry is equivalent to the case having been then moved, except that the Court necessarily required time to hear the case; but the party ought to be prepared with all his materials within the first four days, and cannot add any afterwards.

The Court held the objection to be valid, and refused to allow the affidavit to be read, and the case was argued on the other affidavits.

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—
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HARRISON v. JONES.

Jan: 24.

IN this case, which had been ordered to be tried before the undersheriff of Denbighshire, issue was joined on the 6th of June, in Trinity Term. It appeared by the affidavit that the undersheriff had held seven Courts since issue joined.

The rule as to the time for moving for judgment as in case of a nonsuit is the same in cases to be tried before the sheriff, as in those at Nisi Prius.

Granger now moved for judgment as in case of a nonsuit, and contended that sufficient time had elapsed. [*Alderson*, B.—No; this is a country cause, and issue having been joined in an issuable term, there ought to be a lapse of two Assizes.] But this is a cause to be tried before the sheriff, and is therefore distinguishable, and it is sworn that the undersheriff has held seven Courts since issue joined.

PARKE, B.—The motion is made too soon. It has been decided that the rule, as to moving for judgment in case of a nonsuit, is the same in cases to be tried before the sheriff as in those at Nisi Prius.

LORD ABINGER, C. B., ALDERSON, B., and GURNEY, B., concurred.

Rule refused.

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Jan. 26.

An attorney is not entitled to recover his bill of costs for conducting an action which he has not terminated, but which has been discontinued, unless he shews satisfactory reasons for not proceeding with it, and gives his client reasonable notice thereof.

NICHOLLS v. WILSON.

THIS was an action of debt, to recover the sum of 10*l.* 12*s.* 7*d.*, the amount of an attorney's bill for work and labour done in a cause of *Wilson v. Smith*.

The defendant pleaded *nunquam indebitatus*.

At the trial before the undersheriff of Warwickshire, at Birmingham, on the 18th instant, the plaintiff proved his retainer, the work done, and the delivery of a signed bill one month before action brought. The defendant called a witness, who proved that the action against Smith had been discontinued by the plaintiff, who, in answer to a question put to him by the witness in the defendant's presence, as to why he had commenced the action and afterwards discontinued it, stated, that "he found there were difficulties in the road which induced him not to go on." On this evidence the case went to the jury, the undersheriff observing, that the attorney had no right to stop suddenly short in an action, without giving reasonable notice to his client to furnish him with money, and that as the action had not proceeded to a legal termination, he thought the plaintiff was not entitled to recover. The jury having found for the defendant,

Montagu Chambers now moved for a new trial, on the ground of misdirection, and of the verdict being against the evidence.—The undersheriff left the case improperly to the jury. An attorney is not bound to prosecute to a final end every suit he commences. If he has sufficient and reasonable cause for doing so, he may relinquish it without disentiing himself to costs for the period during which he conducted it. That was decided in *Vansandau v. Browne (a)*. In *Wadsworth v. Marshall (b)*, it was held that

(a) 9 Bing. 402; 2 M. & Scott, 543.

(b) 2 Cr. & J. 665.

if an attorney has reasonable and probable cause for commencing an action, and desists from prosecuting it because he afterwards discovers that it cannot be proceeded with successfully, he is still entitled to recover his costs from his client. [Lord *Abinger*, C. B.—He ought to give notice to his client that he cannot proceed without funds.] The plaintiff was clearly entitled to relinquish the conduct of the cause upon just grounds and reasonable notice, and the defendant should have shewn that reasonable notice was not given, if such was the fact. It was not imputed that the plaintiff had been guilty of negligence, or had improperly determined the action. [*Gurney*, B.—The negligence stated as the cause of terminating the action, is that the plaintiff met with difficulties in prosecuting it; but what those difficulties were does not appear.]

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LORD ABINGER, C. B.—I do not lay it down as a rule, that an attorney cannot in any case recover his costs without having given notice to his client previously to discontinuing a suit, because it is possible to conceive circumstances under which an attorney might be justified in abandoning proceedings without any notice. In this case, however, I see no reason for granting a rule.

PARKE, B.—The rule is correctly laid down in *Harris v. Osbourn* (a), where Lord *Lyndhurst* said, “I consider that when an attorney is retained to prosecute or defend a cause, he enters into a special contract to carry it on to its termination. I do not mean to say, that under no circumstances can he put an end to this contract; but it cannot be put an end to without notice.” There might be instances where he would be at liberty to do so without notice, because a case might occur so plain as not to require notice. Certainly, in this case, the action not

(a) 2 C. & M. 629.

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WILSON.

having been brought to a termination, it was for the plaintiff to shew satisfactorily why he had not proceeded with it.

ALDERSON, B., and GURNEY, B., concurred.

Rule refused.

Jan. 26.

PEARSON v. ARCHBOLD.

The Court will not grant a rule calling upon a party to pay money found by an award, to be due from him, without an affidavit of the service of the award.

THE above cause and all matters in difference having been referred by order of Nisi Prius, the costs to abide the event, the order was made a rule of Court; and the arbitrator awarded that 16*l.* was due from the plaintiff to the defendant.

Sir John *Bayley* now moved for a rule calling upon the plaintiff to pay the money found due, and the costs of the cause, which had been taxed at 38*l.*, with the view of issuing execution under 1 & 2 Vict. c. 110, s. 18. The affidavit on which he moved did not contain any statement that the award and allocatur had been served upon the plaintiff.

Lord ABINGER, C. B.—I think there should be an affidavit of the service of the award.

Rule refused.

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1843.

LEWIS v. LORD TANKERVILLE.

Jan. 28.

BUTT had obtained a rule, calling on the plaintiff to shew cause why a warrant of attorney given and executed by the defendant should not be set aside, on the ground that it was not attested by an attorney nominated by the party executing it, as required by stat. 1 & 2 Vict. c. 110, s. 9. It appeared from the affidavits, that the defendant had been for some years resident abroad, and that the application was made by an attorney on his behalf, who stated, in the affidavit on which the rule was obtained, "that for many years previous to the execution of the warrant of attorney in question, and at the period at which the same bears date, and thenceforth hitherto, this deponent was, and still is, the attorney for the defendant."

An application to set aside a warrant of attorney, on the ground of its not having been duly attested in compliance with the statute, can only be made by the party himself, or by an attorney employed and authorized by him for that purpose.

Jervis shewed cause.—It does not appear that the person who makes this application has any instructions from Lord Tankerville, or any authority from him to make this application, and the Court will not set aside a warrant of attorney except at the instance of the defendant himself, or on the application of an attorney employed by him for that purpose. In *Plunkett v. Buchanan* (a), where a party seeking to reverse an outlawry did not appear in person, but by attorney, it was held that it must appear by the affidavit that the attorney was authorized by him to make the application.

Butt, contra.—The statute does not contain any provision as to the party applying; nor is there any authority to support such an objection as the one here made. [*Alderson*, B.—There is no affidavit that the application is made on behalf of and by the desire of the defendant.]

(a) 3 B. & C. 736.

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v.

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TANKERVILLE.

The authority sufficiently appears, for it may very well be inferred that an attorney who has a general authority to act for another, has power to do so in a particular instance.

LORD ABINGER, C. B.—There should have been either an affidavit made by Lord Tankerville himself, or one stating an authority from him to make the application, so as to shew that it was made by a party acting as attorney for him in the particular transaction. This is too obvious to require any authority, and I think the rule ought to be discharged with costs.

PARKE, B.—It ought to be the application of the party himself, or that of some one standing in the same position, as for instance, his assignees in case of bankruptcy.

ALDERSON, B.—There is no statement in the affidavit that the attorney is Lord Tankerville's attorney for this particular purpose, and I think the Courts have never interfered without the application being made by the party himself or some one claiming under him.

Rule discharged, with costs.

Jan. 31.

LEWIN v. HOLBROOK.

A cause and all matters in difference were referred by an order of reference to the de-

cision of an arbitrator, the arbitrator to make and publish his award, ready to be delivered to the parties, or either of them, "or if they or either of them should be dead before the making of the said award, to their respective personal representatives who should require the same," on or before a certain day. Several meetings were from time to time held, but one of the parties died before the reference was concluded. After his death, the arbitrator was requested to proceed with the reference, but he declined doing so, the executrix of the deceased party having refused to attend, and protested against his proceeding:—*Held*, that the Court had no power to direct the arbitrator to proceed, or to compel the executrix to attend before him.

the consent of the attornies on both sides referred to arbitration, under a Judge's order dated the 18th March, 1841, whereby "the arbitrator was to make and duly publish his award in writing of and concerning the matters, ready to be delivered to the said parties or to either of them, or if they or either of them should be dead before the making of the said award, to their respective personal representatives who should require the same, on or before the 1st day of Trinity Term next ensuing the day of the date thereof, or on or before any other day to which the said arbitrator should by any writing under his hand from time to time enlarge the time for making his said award." And the arbitrator was to be "at liberty, if he should think fit, to examine the parties to the suit, who were to produce before him all such books, deeds, papers and writings in their or either of their custody or power relating to the matters in difference, as he should require." Meetings were from time to time held before the arbitrator until the 27th of December, when the defendant died. During the month of January, 1842, several applications were made to the arbitrator to proceed with the reference, who declined to do so until there was a legal representative of the defendant. In August, the defendant's will was proved in the Prerogative Court of Canterbury by Elizabeth Holbrook, the widow and sole executrix of the defendant. After several applications, the arbitrator appointed a meeting for the 6th January, 1843, notice whereof was given to the defendant's attorney. The plaintiffs accordingly attended by counsel before the arbitrator, but no one appeared on the other side; and the arbitrator stated that the defendant's attorney had served him with notice on behalf of the executrix, that in consequence of the defendant's death the cause had abated, and protesting against his making any award thereon. He then declined to proceed with the reference, and recommended an application to the Court.

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Exch. of Pleas, 1843. The time for making the award had been from time to time duly enlarged.

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Montagu Chambers now moved for a rule to shew cause why the arbitrator should not proceed with the reference, and make and publish his award as if the defendant were still living.—Although in ordinary cases the death of one of the parties operates as a revocation of the arbitrator's authority, it is not so where, as in this case, the order of reference expressly provides for the event, by directing the award to be delivered to the personal representatives. [Lord *Abinger*, C. B.—What power have we to compel the executrix in this case to go before the arbitrator: how can we enforce this agreement after the death of one of the parties? We cannot attach the executrix.] It must be implied here that the intention of the parties was, that the death of either should not revoke the arbitrator's authority; and if the arbitrator proceeds, his award will be good (*a*), though it cannot be enforced by attachment.

PARKE, B.—If you go on with the reference and get your award, then you have a remedy against the personal representative, because the defendant has agreed that his assets shall be bound thereby; but the Court has no power to direct the arbitrator to proceed.

Rule refused.

(*a*) See *Tyler v. Jones*, 3 B. & C. 144, and *Clarke v. Crofts*, 4 Bing. 143; 12 Moore, 349.

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1843.

WILSON v. BRETT.

Jan. 27.

CASE.—The declaration stated, that the plaintiff, at the request of the defendant, caused to be delivered to the defendant a certain horse of the plaintiff of great value, to wit, &c., to be by the defendant shewn to a certain person to the plaintiff unknown, and to be re-delivered by the defendant to the plaintiff on request, and that thereupon it then became and was the duty of the defendant to take due and proper care of the said horse, and to use and ride the same in a careful, moderate, and reasonable manner, and in places fit and proper for that purpose: yet the defendant, not regarding his duty &c., did not nor would take due and proper care of the said horse, but on the contrary used and rode the same in a careless, immoderate, and improper manner, and in unfit and improper places, &c., whereby the said horse was injured, &c.—Plea, not guilty.

A person who rides a horse gratuitously, at the owner's request, for the purpose of shewing him for sale, is bound, in doing so, to use such skill as he actually possesses; and if proved to be a person conversant with and skilled in horses, he is equally liable with a borrower for injury done to the horse while ridden by him.

At the trial before *Rolfe*, B., at the London Sittings in this term, it appeared that the plaintiff had intrusted the horse in question to the defendant, requesting him to ride it to Peckham, for the purpose of shewing it for sale to a Mr. Margetson. The defendant accordingly rode the horse to Peckham, and for the purpose of shewing it, took it into the East Surrey Race Ground, where Mr. Margetson was engaged with others playing the game of cricket: and there, in consequence of the slippery nature of the ground, the horse slipped and fell several times, and in falling broke one of his knees. It was proved that the defendant was a person conversant with and skilled in horses. The learned Judge, in summing up, left it to the jury to say whether the nature of the ground was such as to render it a matter of culpable negligence in the defendant to ride the horse there; and told them, that under the circumstances, the defendant, being shewn to be a

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person skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it; and that, if they thought the defendant had been negligent in going upon the ground where the injury was done, or had ridden the horse carelessly there, they ought to find for the plaintiff. The jury found for the plaintiff, damages 5*l.* 10*s.*

Byles, Serjt., now moved for a new trial, on the ground of misdirection.—There was no evidence here that the horse was ridden in an unreasonable or improper manner, except as to the place where he was ridden. The defendant was admitted to be a mere gratuitous bailee; and there being no evidence of gross or culpable negligence, the learned Judge misdirected the jury, in stating to them that there was no difference between his responsibility and that of a borrower. There are three classes of bailments; the first, where the bailment is altogether for the benefit of the bailor, as where goods are delivered for deposit or carriage; the second, where it is altogether for the benefit of the bailee, as in the case of a borrower; and the third, where it is partly for the benefit of each, as in the case of a hiring or pledging. This defendant was not within the rule of law applicable to the second of these classes. The law presumes that a person who hires or borrows a chattel is possessed of competent skill in the management of it, and holds him liable accordingly. The learned Judge should therefore have explained to the jury, that that which would amount to proof of negligence in a borrower, would not be sufficient to charge the defendant, and that he could be liable only for gross or culpable negligence.

Lord ABINGER, C. B.—We must take the summing up altogether; and all that it amounts to is, that the defendant was bound to use such skill in the management of the horse as he really possessed. Whether he did so or not

was, as it appears to me, the proper question for the jury. I think, therefore, that the direction was perfectly right, and that no rule ought to be granted.

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PARKER, B.—I think the case was left quite correctly to the jury. The defendant was shewn to be a person conversant with horses, and was therefore bound to use such care and skill as a person conversant with horses might reasonably be expected to use: if he did not, he was guilty of negligence. The whole effect of what was said by the learned Judge as to the distinction between this case and that of a borrower, was this; that this particular defendant, being in fact a person of competent skill, was in effect in the same situation as that of a borrower, who in point of law represents to the lender that he is a person of competent skill. In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it.

ALDERSON, B.—The learned Judge thought, and correctly, that, this defendant being shewn to be a person of competent skill, there was no difference between his case and that of a borrower; because the only difference is, that there the party bargains for the use of competent skill, which here becomes immaterial, since it appears that the defendant has it.

ROLFE, B.—The distinction I intended to make was, that a gratuitous bailee is only bound to exercise such skill as he possesses, whereas a hirer or borrower may reasonably be taken to represent to the party who lets, or from whom he borrows, that he is a person of competent skill. If a person more skilled knows that to be dangerous which another not so skilled as he does not, surely that makes a difference in the liability. I said I could see no difference between *negligence* and *gross negligence*—that it

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was the same thing, with the addition of a vituperative epithet; and I intended to leave it to the jury to say whether the defendant, being, as appeared by the evidence, a person accustomed to the management of horses, was guilty of culpable negligence.

Rule refused.

Jan. 28.

MACKINTOSH and DWYER v. MARSHALL.

The Shipping List at Lloyd's, stating the time of a vessel's sailing, is *prima facie* evidence against an underwriter as to what it contains, as the underwriter must be presumed to have a knowledge of its contents, from having access to it in the course of his business: but where the insurer, in a letter written for the purpose of effecting the insurance, made a false statement and concealment as to the time of the vessel's sailing, and the underwriter, relying upon that representation, did not in fact look at the list, but acted upon the representation in making the insurance:—*Held*, that the underwriter was not bound by the contents of the list, so as to render the misrepresentation and concealment by which he was misled immaterial, and that it was the duty of the Judge to have pointed out to the jury that misrepresentation and concealment.

ASSUMPSIT on a policy of insurance at and from Newfoundland to Liverpool, effected by George Mackay, as agent for the plaintiffs, on a ship called the Elizabeth, including risk of craft, boats, and lighters of every description, valued at £550, in oil. The defendant pleaded, 1st, non assumpsit; 2ndly, that Mackay was not the agent of the plaintiffs; 3rdly, that the plaintiffs were not interested in the oil; 4thly, that the ship was not lost by the perils of the sea; 5thly, that he subscribed the said policy and made the said promise as in the declaration mentioned, after the said ship or vessel had sailed on the said voyage in the said policy mentioned, and that the said subscription and promise were obtained from him, the defendant, by the fraud, falsehood, and misrepresentation of the plaintiffs, to wit, as to and concerning the time of sailing of the said ship or vessel, and the time of sending and dispatching of the order to insure the said oil in the said policy mentioned, and by the fraudulent concealment from the defendant by the plaintiffs of certain facts and information which before and at the time of procuring the said policy and subscription were known to the plaintiffs, and were then material to be known by and ought then to have

been communicated to the defendant, to wit, amongst other things, as to and concerning the time of sailing of the said vessel, and as to and concerning the said voyage in the said policy mentioned.

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The replication took issue on the first four pleas, and to the last replied, that the subscription and promise were not obtained from the defendant by the fraud, falsehood, misrepresentation or fraudulent concealment of the plaintiffs.

At the trial before *Maule, J.*, at the last Liverpool Assizes, it appeared that the plaintiffs were merchants, Mackintosh living at Liverpool and Dwyer at St. John's, Newfoundland, and the defendant was an underwriter at Lloyd's, living in London. It appeared that, on the 27th of January, 1842, Mackay, a broker, went to Lloyd's, where he saw the defendant, and shewed him the following letter, which he had received from the plaintiff Mackintosh.

"Liverpool, 26th January, 1842.

"We have advices from St. John's, Newfoundland, of the 27th ultimo, of train oil being shipped on board the *Elizabeth*, Spence master, for this port, to the amount of £550—a new vessel, and *to sail the end of the month*. Will you have the goodness to effect insurance for the above sum, which we trust will be done at the lowest rate of the day?"

The defendant named the premium 30s. per cent., which was the rate for an ordinary risk, and the slip was signed, but the policy was not signed until the following day, the 28th of January. The broker and the defendant went into the room where the shipping lists were kept, and the broker referred to a St. John's list, which was lying on the table. He said he would not undertake to say that the defendant ever looked at the list, but in that list there was a statement in writing, that it had arrived by the ship *Amelia*. The broker said, "I told the defendant the original was on board the *Elizabeth*, and the slip was then signed." The broker then stated that on the following day he met the

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defendant, who said he had heard that the Elizabeth had sailed on the 27th of December, and if there were any loss he should require to ascertain the correspondence of the plaintiff, in order to ascertain whether the plaintiff had not correct information of the day the vessel sailed. A witness of the name of Oughterson, a merchant, also stated that he himself had goods on board the Elizabeth, and that on the 24th of January he had received a letter from a correspondent at Greenock about the Elizabeth, and that on the 26th, which was the day that Mackintosh sent instructions to insure, he met Mackintosh on 'Change, and told him he had heard from Greenock, and that he merely said to him, without shewing the letter, "I have advices of the 27th of December, and they were not aware the Elizabeth had sailed." The list which had been referred to by the broker at Lloyd's was offered in evidence, but was objected to by the defendant's counsel, on the ground that the defendant, although the broker pointed to it on the table, was never shewn to have looked at it. The learned Judge, however, admitted the list, and it was read, and on the front of it was written "Original per Elizabeth." On the back of it there was a statement that the Elizabeth sailed on the 27th of December from St. John's. The defendant put in evidence two letters written by the plaintiff's partner at St. John's, containing directions to him to insure. The first letter was dated St. John's, 24th December, 1841, and was in the following terms:—

"We have shipped on board the Elizabeth, Spence master, to your address, 3479 gallons of cod oil and 2428 gallons of cod blubber, and 27 cwt. junk, amounting to £550 sterling. *She is to sail about the 25th instant.* She is a new vessel. You could endeavour to save the insurance—give three or four days. It will all depend on the weather you have at home."

This letter was proved to have been received by Mack-

intosh on the 15th of January. The second letter was in nearly the same terms, and was also dated on the 24th December, but it did not leave till the 30th, and came by the *Amelia*. This letter said—"You can allow her from sixteen to twenty days. You can run a reasonable risk to save the insurance, but all will depend on the state of the weather on the other side." The *Amelia* met with bad weather, and put into Cork, and this letter bore the Cork post mark of the 19th of January, and the Dublin post mark of the 20th of January, and in the ordinary course would arrive in Liverpool on the 21st of January. Upon that letter Mr. Mackintosh had indorsed that he received it on the 24th. The defendant's counsel contended that the insurer ought to have communicated these letters to the underwriter, to give him the opportunity of forming his judgment upon them; and that he ought at all events to have informed the underwriter that he was endeavouring to save the insurance. The learned Judge left the case to the jury, saying, that the plaintiffs contended that the statement of Oughterson, that the vessel had not sailed on the 27th, superseded the letters which he had received, and the intimation as to the time of sailing on the 25th was merged in the subsequent more accurate information of the 27th; and he added, the words "about the end of the month" would comprehend the last five or six days of the month. The learned Judge then said—"Another ground has been a good deal relied on by the defendant, namely, the direction not to insure until a reasonable risk had been run. In my opinion that is not a circumstance which the insurer is bound to communicate." And he left it to the jury to say whether on the whole there was any misrepresentation or concealment; and the jury found their verdict for the plaintiffs.

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Knowles, in Michaelmas Term (November 4), moved for a new trial, on the ground that the Shipping List

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at Lloyd's was improperly received in evidence, and also on the ground of misdirection, and the verdict being against the evidence. First, the list pointed to at Lloyd's was not receivable in evidence. The broker did not say the list contained any information as to the time of the Elizabeth's sailing, and his saying that the original was on board the Elizabeth was of itself likely to lead to the supposition that that list would not contain the time of the Elizabeth's sailing. It was not proved that the defendant looked at it. [Lord *Abinger*, C. B.—It was a document at a place to which the defendant had constant access; it is considered accessible to underwriters, and you are not bound to inform an underwriter what it contains.] It could not, it is submitted, be put in for the purpose of fixing the underwriter with exact notice of the date of sailing, on the ground that he might have obtained that knowledge if he had searched the list. If in any case you are seeking to affect a party by shewing a notice or advertisement in a paper, it is not sufficient to shew that that paper is in a coffee-house to which the party occasionally goes, and where he may see it if he chooses; you must bring the paper under the direct knowledge of the party to be charged. [Lord *Abinger*, C. B.—You always assume that underwriters have all the knowledge to which they have the means of access in the course of their business and trade. It must be part of their occupation to look at Lloyd's list. The defendant is told that the original of this list is in the Elizabeth; therefore he must have known it would probably come by a vessel which sailed after the Elizabeth.] The broker does not call the defendant's attention to the list as containing the time of sailing, but merely points out the St. John's list, and says the original is on board the Elizabeth. That list ought not to have been received to shew the actual date of the sailing of the Elizabeth.

Then, secondly, there was a misdirection on the part of the learned Judge, and the verdict was against evidence.

No doubt the jury are the judges whether there has been any misrepresentation or concealment of a material fact, but the Court in all cases takes upon itself to decide what is a material circumstance to be disclosed, and therefore it is for the Judge to tell them whether the particular circumstance is material to be made known or not. In *Rickards v. Murdock* (a), the Court took upon itself to decide a point of that sort; but the learned Judge at the trial appears to have overruled that case, and told the jury that the fact of the direction to run reasonable risk, and not to insure till after a certain time, was not a fact material to be known, which is contrary to the decision in *Rickards v. Murdock*. Here the parties calculated the ordinary voyage to be from sixteen to twenty days, and Dwyer tells his partner to wait three or four days over the ordinary voyage. The underwriter ought to have every circumstance before him on which the insurer forms his judgment. The learned Judge ought, therefore, to have told the jury that these letters were material, and ought to have been communicated. And the letter of the 26th of January was a clear misrepresentation.

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LORD ABINGER, C. B.—I do not think there ought to be any rule on the admission of improper evidence; I am clearly of opinion that it was admissible: but on the ground of misdirection and the verdict being against the evidence, you may take your rule.

Wortley and Crompton now shewed cause.—There were two questions in this cause: the first, whether there had been any fraudulent misrepresentation, and the second, whether there was an omission to communicate a material fact. The first letter uses these expressions: "She is to sail about the 25th instant—She is a new vessel—You can endeavour to save the insurance—Give

(a) 10 B. & C. 527.

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three or four days. It will all depend on the weather you have at home." That part of the letter as to giving three or four days was under the circumstances of little consequence, for it was a mere direction to his partner that if the weather was such as it turned out to be, namely strong prevailing winds from the East, he could probably afford to give three or four days. Then the second letter does not state any time for sailing. Having received these two letters, Mr. Mackintosh is told by Mr. Oughterson on 'Change, "We do not hear that the Elizabeth had sailed down to the 27th." That is not that he had heard a mere rumour, but that he had had the fact communicated to him by his correspondent. After that communication, Mr. Mackintosh writes the letter of the 26th of January. Upon that the first question is, whether there was a fraudulent representation. The jury have found that there was none. It is clear that Mr. Mackintosh communicated that which was the impression on his own mind. He believed that the vessel had not sailed on the 27th, and was not to sail till the end of the month. As to the fraudulent misrepresentation, therefore, the facts are all consistent with bona fides, and the jury have found in favour of the plaintiffs. Then as to the question of concealment, which was the principal question. The means were placed by the agent of Mackintosh in the hands of the underwriter, of becoming perfectly acquainted with the time of the vessel's sailing. His attention was pointed to the list lying on the table; and on that list was written "Duplicate per Amelia—Original per Elizabeth;" and it shewed that the Amelia had sailed on the 30th. That was specific information to him that the other vessel had sailed before that day, and he must be taken to have known it, as that list must be presumed to be present to the mind of every insurer at Lloyd's in making a contract of this description. And in that list was stated the actual day on which the vessel sailed—"The schooner Elizabeth sailed on the 27th."

The defendant must therefore be taken to be cognizant of that fact. [Lord *Abinger*, C. B.—It is very plain, that if he had seen the statement of the day of the *Elizabeth* sailing, it would have altered his ideas of the risk. If no evidence is given of anything tending to mislead the underwriter, and the fact is stated in the list, although he be not shewn to have actually had any knowledge of it, yet he is presumed to be acquainted with the fact; but where a representation is made to him which is not consistent with the truth, it is no answer to that to say, that he might have found out the truth if he had searched *Lloyd's* list, because he trusts to the representation. It is plain he trusted to the representation in the present case, from his taking only 30s. per cent., because other persons who had seen the list took three guineas. The only advice he had was that the vessel would sail on the 25th.] Yes, the only actual advice; but the question is whether, the actual fact being that she did not sail until the 27th, and the insurer having that fact present to his mind, as it must be taken to be, there was anything concealed from him. [Lord *Abinger*, C. B.—Why are you to suppose it to be present to the defendant's mind that she sailed on the 27th?] Because the list is acknowledged evidence of it. [Lord *Abinger*, C. B.—Where there is a total silence of the party insuring about the ship's sailing, if there comes to be a question as to the time of sailing, the list is evidence; but here there is a positive representation, which prevents him from looking over that evidence. *Parke*, B.—The fact is, the plaintiff gave him untrue information—but he also gave him the chance of detecting some part of it by looking at *Lloyd's* list.] Not the chance but the actual means, and it was the duty of the underwriter to inform himself of what the list contained. [Lord *Abinger*, C. B.—The objection here is, first, that Mr. Mackintosh does not tell what he knew, and secondly, that he tells the contrary of what he knew. *Gurney*, B.—

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He states expressly that which is not true. He stated "we have advice" so and so, when he had it not.] The learned Judge left it to the jury to say what he meant by that. [Lord *Abinger*, C. B.—No ; what the other party understood by it. The learned Judge ought to have told the jury that he concealed what he knew, and represented what he did not know. He had no notice that the vessel was to sail at the end of the month ; it was only that certain persons at Greenock had not heard she had sailed on the 27th.] The question is, with these means of knowledge in the hands of the underwriter, whether there was anything that was clearly concealed by the insurer. If he had relied on the letter from Newfoundland alone, it certainly would not have been the best information ; he then would have concealed the best information ; but he did communicate that which was the last intelligence he had ; and his agent pointed to the list, which contained the means of information to the underwriter's mind. There has been no misdirection shewn, and the case was left distinctly to the jury whether there was any material suppression which could have altered the risk, and they have negatived it.

Lord *ABINGER*, C. B.—I am clearly of opinion that there ought to be a new trial in this case. Whether the learned Judge made any mistake or not, is one question to be considered. I incline to think he did ; and I will begin with that topic on which I should say the learned Judge has not adequately directed the jury. This case was moved for misdirection, in receiving the list at *Lloyd's* in evidence. I said it was in all cases evidence to go to the jury, because the underwriter is supposed to have made himself master of the contents of the list, and therefore we refused to grant a rule on that ground. But the learned Judge does not seem to have adverted to this, that though the list is evidence, yet if a party subscribe a policy, relying

on the representation of the person who comes to effect it, which representation is not consistent with the list, then the list at Lloyd's is no answer to it, because though the underwriter may have access to such list, and may be presumed to have access to it, where there is nothing to mislead him, yet there may be something upon which he relied that misled him; and where it is manifest that if he had adverted to the list he never would have taken the premium in question, it appears to me that in such a case the presumption that he had looked at the list is entirely rebutted; and it must be considered in this case, that though he might have looked at the list, he did not, but relied on the representation made to him. That representation was, that the party had received advice from Newfoundland of the 27th, that the Elizabeth had oil on board, and would sail towards the end of the month. Now what was the advice he had in fact received? He had received the letter of the 24th December, stating that she was then loading with a cargo of oil, and that she would sail about the 25th. That advice had not been corrected or altered by any letters he had received from his own correspondent at Newfoundland. He receives, however, a communication from a gentleman or friend of his whom he meets on the Exchange at Liverpool, that that gentleman had received a letter from Greenock, which letter states "We have not heard from our correspondent at Newfoundland that the Elizabeth had sailed *down to* the 27th." That must be a letter written on the 26th in the evening, which of course would exclude the 27th. In the first place, that letter contained no affirmative recognition that she had not sailed, but simply that the correspondent abroad had not mentioned it in his advices; and therefore it was not at all what the plaintiff had a right to take as a contradiction of the advice he had received from his own correspondent. Nevertheless, after he gets the second letter, which in all probability arrived at Liverpool on the 21st of January,

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he waits until the 26th, and then he sends the letter in which he says—"I have received advices from St. John's of the 27th of a cargo of oil by the Elizabeth,"—that was not true,—“and that she would sail towards the end of the month,”—that was not true; he had received no such advice even from the gentleman at Greenock: and then his agent who effects the policy refers the defendant to the list at Lloyd's, in which it appears there was a statement that it came by the Amelia, which sailed on the 30th. It was probable the Elizabeth might have sailed the day before, or the 28th, or on the morning of the 30th before that vessel, because it is the practice to send duplicates by the vessels which are going at the same time. It appears on the statement of the whole facts, that if the defendant had seen the other side of the list, he would not have taken 30s. per cent. premium; and he himself, on that day, after he had signed the slip, stated that he had some doubt on that subject, and said, "I must see all your correspondence; I must see that you have made a fair representation." It is plain that at the time when he agreed to take the 30s. per cent., he could not have had that information. Then his knowledge of the circumstances as to the period of the vessel's sailing is rebutted, and the fact is established that he relied on the representation. It is equally clear that the representation made to the defendant both states what is not true, and conceals what should not have been concealed,—the representation which the assured had received, both of which were material to the underwriter: therefore I think that on this ground the defence was clearly made out. Whether the rule should be made absolute without costs or not, seems to depend upon whether the learned Judge left too much to the jury. I should say that though it be generally true that the materiality of the description is a question for the jury, yet the Judge ought to take care that the jury are not misled by any thing that comes out in the evidence; and in this case I do not

find from the notes on either side, or the notes of the learned Judge, that he cautioned the jury against giving credit to the assertion made in argument, that they were bound to consider the underwriter as knowing the contents of that list. I think he ought to have told them, under the circumstances, that they were bound to presume he did not know them. He seems to have fallen into an error by not observing the distinction, which if Mr. *Wortley* looks through the cases on this subject he will find to be, that the materiality of such a document at Lloyd's depends entirely on the silence of all parties respecting the day of the vessel's sailing. Where there is no wrong representation about it, no communication calculated to mislead, then the document at Lloyd's is competent evidence, where the means of knowledge are common to both. Those are the only cases in which that document concludes the underwriter. Upon the whole, I am inclined to think the best way will be to make the rule absolute for a new trial, and let the costs abide the event.

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PARKE, B.—I am entirely of the same opinion. I quite concur with my Lord *Abinger*, that there has been a concealment of material facts, and also an allegation of facts which really were untrue.

ALDERSON, B.—I am of the same opinion. I think, the moment it appeared that the party was communicating a letter, which clearly stated that the vessel was to sail subsequently to the 27th of December, before the jury could consider the defendant to have been bound by the list at Lloyd's, they ought to have had affirmative evidence that he actually did see it, and not merely that he might. There is no evidence to shew that.

GURNEY, B.—There is nothing so important as that a fair and full and honest communication should be made by

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the person who insures : it is even more essential that there should be no falsehood ; but here there is both falsehood and concealment.

Rule absolute ; the costs to abide the event.



BOWKER and Another, Assignees of the Estate and Effects of RICHARD POTTER, JOHN POTTER and JAMES POTTER, Bankrupts, v. BURDEKIN, Public Officer.

Jan. 28.

It is not necessary that the delivery of a deed as an escrow should be by express words ; if, from the circumstances attending the execution, it can be inferred that it was delivered not to take effect as a deed until a certain condition were performed, it will operate as a delivery as an escrow only.

Where a deed of assignment, purporting to be made by all three partners of a firm, and to convey all their personal estate and effects

whatsoever in trust for the benefit of creditors, was executed by one of them only :—*Held*, that it operated to convey the share of the one who so executed.

And where one of the partners executed such an assignment of the partnership property before, but the others did not execute it until after, a fiat in bankruptcy had issued :—*Held*, in the absence of any thing to shew that the deed was delivered as an escrow, that it amounted to an act of bankruptcy by the one who so executed it, and that his share of the partnership property passed to the assignees under the fiat.

TROVER by the plaintiffs, as the assignees of three bankrupts, Richard, John and James Potter, who had formerly carried on business in co-partnership as cotton spinners and manufacturers at Manchester, against the Bank of Manchester, sued in the name of their registered public officer. An interpleader order, dated the 24th November, 1841, was made by this Court on the application of the sheriff of Lancashire, in a cause in which the Bank of Manchester were plaintiffs and the said bankrupts were defendants ; and it directed “ that the said assignees bring an action of trover against the judgment creditor, (the plaintiffs) to which he is to be at liberty to plead specially, so as to put in issue the validity of the fiat in bankruptcy, and the right to the proceeds under the execution.” And the Court directed that the sheriff should sell the goods seized, and pay the proceeds into Court.

Under the authority of this order, the assignees brought

this action to recover the value of certain goods and chattels seized by the said sheriff, under an execution issued under a warrant of attorney given by the bankrupts to the Bank of Manchester.

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The defendant pleaded several pleas, one of them a general denial of the bankruptcy, and gave notice of his intention to dispute the petitioning creditor's debt, and the act or acts of bankruptcy on which the fiat was awarded against the said bankrupts.

At the trial before *Maule, J.*, at the Liverpool Summer Assizes, 1842, the plaintiffs proved various acts of bankruptcy committed by James and John Potter, and with a view to establish an act of bankruptcy against Richard, they put in a deed of assignment to one W. V. Cross for the benefit of creditors, the operative words of which were as follows:—"They the said Richard Potter, John Potter, and James Potter do and each of them doth grant, bargain, sell, assign, transfer, and set over unto the said W. V. Cross, his executors, administrators, and assigns, all and every the stock in trade, wares, merchandize, fixtures, household and other goods, leasehold estates, chattels of every description, sum and sums of money, debts due and owing, ready money and securities for money, books, papers, writings, and all other the personal estate and effects whatsoever and wheresoever of them the said Richard Potter, John Potter, and James Potter, and all the estate, right, title, interest, benefit, claim, and demand of the said Richard Potter, John Potter, and James Potter of, in, to, or out of the same respectively: to have, hold, receive, and take the said stock in trade, wares, merchandize, fixtures, goods, leasehold estates, chattels, sum and sums of money, personal estate, effects, and premises mentioned to be hereby assigned, and all benefit thereof, unto the said W. V. Cross, his executors, administrators, and assigns, upon trust nevertheless that he the said W. V. Cross, his executors or adminis-

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trators, do and shall with all convenient speed absolutely sell and dispose of all the said estate and effects in their nature saleable, either by public auction or private contract, and either together in one lot or otherwise, for the best price or prices and most money that can be obtained for the same, and collect and receive all the debts and sums of money due and owing as aforesaid, and stand possessed of the money arising under these presents upon the trusts hereinafter mentioned. And the said Richard Potter, John Potter, and James Potter do hereby make, ordain, constitute, and appoint the said W. V. Cross, his executors or administrators, to be the true and lawful attorney and attornies for them the said parties hereto of the first part, their executors and administrators, and in their name or names, or in the name or names of the said attorney or attornies, or otherwise, to collect, and by legal proceedings or otherwise to recover and receive all and every the debts and other the premises, as amply as the said parties hereto of the first part, their executors or administrators, could do if personally present, with full power and authority to substitute one or more attorney or attornies under them with like or limited powers. And it is hereby declared that the said trustee, his executors or administrators, shall stand possessed of the monies which shall arise or be received under these presents, in trust, after payment and retention of all costs, charges, rents, taxes, and expenses which may be sustained in or about those presents, or the execution of the trusts and powers thereof, to pay, divide, and distribute the same unto and amongst all and every the creditors of the said Richard Potter, John Potter, and James Potter, who shall come in and execute these presents, or otherwise signify their assent hereto, and also prove their debts by declaration to be made under the act of Parliament for the Abolition of extra-judicial Oaths, before a competent authority (if required by the said trustee), on or before the 1st

day of October next, and their respective executors, administrators, and assigns, in proportion to the several debts due and owing to them respectively from the said Richard Potter, John Potter, and James Potter, the same distribution to be made by an equal pound-rate according to the amount of their said several debts respectively, and without any preference whatsoever." Then followed covenants by the three partners with Cross, that they the said parties thereto of the first part should and would to the best of their power forthwith make and deliver a true and exact account in writing of all their debts and affairs, and aid and assist the said trustee in the management of the affairs of the said trust-estate, and should not receive or intermeddle with any of the said estate, but confirm and allow all and whatsoever the said trustee should lawfully do or cause to be done in or about the premises. And it was thereby agreed and declared, "that it should be lawful for the said trustee to employ the said parties thereto of the first part, or any other person or persons, in winding up the said trust estate and premises, and in collecting, getting in, and disposing of the same or any part thereof, and also in carrying on the business (if the same should be carried on by the said trustee), and to allow to the said parties thereto of the first part, or any of them, or any other person or persons so employed as aforesaid, out of the said trust-estate, monies, and premises, such sum and sums as to the said trustee should seem proper: and the said several persons parties thereto of the third part (the creditors), in consideration of the premises, did thereby for themselves severally and respectively, and for their several and respective heirs, executors, administrators, and partners, covenant, promise, and agree with and to the said parties thereto of the first part, their heirs, executors, and administrators, that they the said parties thereto of the third part should and would accept and take the dividend and dividends to be made un-

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der and in pursuance of those presents, in full satisfaction and discharge of their several debts owing to them respectively by the said parties thereto of the first part, and should not nor would at any time thereafter sue, arrest, attach, take in execution, or otherwise impede or incumber him the said W. V. Cross, in any manner, on account of their said several debts ; and if any of them should do so contrary to the intent and meaning of those presents, that then the said parties thereto of the first part, their heirs, executors, and administrators, should be and they were for ever thereby declared to be clearly acquitted, exonerated, and discharged of and from all actions, suits, debts, and demands whatsoever of the creditor or creditors by whom he should be so sued, arrested, attached, taken in execution, or otherwise impeded or incumbered, and those presents might be pleaded in bar thereto as effectually as a release under the hands and seals of such creditors respectively for that purpose might or could be : provided always, that the said trustee should be at liberty to make all fair and usual charges for all such matters and things as might be done by him relative to the said trust-estate, and should not be charged with or accountable for any monies or effects, other than such as should actually come to his hands by virtue of those presents, nor with or for any loss or damage which might happen in or about the execution of the trust aforesaid, without his wilful neglect or default ; and further, the said trustee was thereby authorized and empowered to pay or make such arrangement with the creditors whose debts were under £5, as the said trustee might deem expedient ; and it was thereby agreed, that whenever the funds arising from the sale of any part of the estate and effects, or from the collection of the debts owing to the said estate, should amount to £100 or upwards, the amount thereof should be paid into the banking house of Messrs. Jones, Lloyd, & Co., bankers, in Manchester, in the name of the said trustee, and that the cheques or orders for drawing

out the said money or any part thereof, should be signed by the said trustee.”

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This deed was executed by Richard Potter on the 8th September, by John on the 6th September, and by James Potter on the 13th September; the fiat was issued on the 13th, before the execution by James. For the defendant it was contended, that no act of bankruptcy on which to found the fiat had been established against Richard, inasmuch as the assignment being a joint deed, and not having been executed by James, the intended third party to it, until after the fiat, it had no existence in law at the time the fiat issued. The case went to the jury, who found that acts of bankruptcy had been committed by John and James independently of the assignment, and with respect to Richard, that he had committed an act of bankruptcy by executing the assignment, and not otherwise. The plaintiffs had a verdict for £15,000, and the learned Judge certified on the record that the acts of bankruptcy were proved, reserving leave to the defendant to move to enter a nonsuit.

Platt having, in Michaelmas Term, obtained a rule to shew cause why a nonsuit should not be entered, or why the damages should not be reduced to the amount which the sheriff had paid into Court,

Knowles, Tomlinson, and Hoggins now shewed cause.—The plaintiffs do not intend to argue the rule as to the reduction of damages. [*Parke, B.*—The Court were of opinion that you ought to be confined to the amount of the proceeds of the goods.] Then the remaining question is, whether Richard Potter committed an act of bankruptcy by executing the assignment. It cannot be disputed that the rule is, that deeds take effect not from their date, but from their delivery; for in *Sheppard's Touchstone*, 72, it is so laid down—“All deeds do take effect

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from, and therefore have relation to, the time, not of their date, but of their delivery." To constitute an act of bankruptcy of this nature, there must be the fraudulent intent to delay creditors, and also the execution of the deed. The fraudulent intent is, however, the main ingredient. Here the fraudulent intent did exist on the 8th of September, when Richard Potter executed the deed, and the deed operated from that time. Where one joint tenant conveys away the joint property, or his share of it, he thereby severs the joint tenancy, and as to his share the conveyance is effectual. There never could have been a question upon this subject, except for the doubt expressed by Lord Eldon in *Dutton v. Morrison* (a). After alluding to the cases of *Small v. Oadley* (b), *Worsley v. De Mattos* (c), and *Harman v. Fisher* (d), his Lordship says—"The question then is, whether within the principles of those decisions this deed is an act of bankruptcy, attending to the true construction of it altogether; to what was intended to be done, and what is considered as not intended, if the whole that was intended was not capable of being done. Admitting that this was not intended to be a several deed, but the creditors through the mutual agreement of all were to derive a benefit against each, if two retired from that agreement and no bankruptcy had occurred, could the creditors have taken advantage of the deed against one who executed, but who, it must be admitted, did not mean to execute, so as to give the deed any effect, unless the others devoted their shares of the property to the same purpose? I doubt whether that would be the legal effect; as in many cases the law considers a variety of instruments as forming one transaction, and would not give effect to any instrument unless the whole transaction was completed. If this instrument had been delivered as an escrow, there could be

(a) 17 Ves. 193; 1 Rose, 213.

(b) 1 P. Wms. 427.

(c) 1 Burr. 467.

(d) Cowp. 117.

no doubt : and if it was delivered by one only, for no other reason but that the others could not execute, has that act any effect preventing his continuing a trade, or dedicating his property to any purpose whatsoever? Under such circumstances I am unwilling to decide this question myself; the more so from reflecting upon the necessity of extreme caution in determining what is an act of bankruptcy, and the consequences that may follow in criminal proceedings, from permitting a commission to issue or to go upon a doubtful act of bankruptcy." And he proceeds to say, that unless there were other acts of bankruptcy, a case ought not to be directed. It turned out that there were other acts of bankruptcy, and this objection was given up. That case only expresses the existence of a doubt in Lord *Eldon's* mind at the time, whether any interest would pass, having reference to the intention of the parties, which was a doubt rather upon the facts than upon the law. In that case the deed never was complete, and so far it is distinguishable from this. But there is another ground on which Lord *Eldon's* judgment proceeded, namely, on its being admitted that the transfer was intended to be a joint act; he says,—“admitting that this was not intended to be a several deed.” Now in the present case the deed is several as well as joint; for the words of the granting part are “they the said Richard Potter, John Potter and James Potter do and *each of them* doth” &c., which words make it a several as well as a joint conveyance. It cannot be pretended that this was delivered as an escrow, and that is the only case in which a deed does not operate from the delivery. It was not delivered to a stranger, but to a party who was to take a benefit under it, nor was it accompanied by words indicating any intention to deliver it as an escrow. It may perhaps be said that the old cases on this subject have been overruled, and that apt words for that purpose are no longer necessary; but if that be so, still the jury are to form an opinion from all the circumstances whether the intent was to deliver ab-

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solutely or conditionally. Perhaps *Johnson v. Baker* (a) will be cited; but although it was there held that what are termed apt words of delivery were not necessary, that case is distinguishable, for there the deed was not delivered to a party interested but to a stranger, and the old law was not overruled in other respects. In *Murray v. The Earl of Stair* (b), a subscribing witness to a bond stated that it was delivered by the obligor as his deed, but that, before and at the time of the execution, it was agreed that it should remain in his (the subscribing witness's) hands until the death of A. B. and until certain securities were given up, and that the bond was given up to him upon that condition; and it was held that it was a question of fact for the jury upon the whole evidence, whether the bond was delivered as a deed to take effect from the moment of the delivery, or whether it was upon the express condition that it was not to operate as a deed until the death of A. B. and until the securities were given up. But in that case also there was a delivery to a stranger, and there was something said at the time of the execution to render it conditional. Here it is not pretended that anything was said at the time of the execution of the deed to indicate any condition, nor is there anything to shew a conditional and not an absolute delivery. In all cases a deed takes effect from the date of the delivery, except in the case of an escrow; and then it refers to the second delivery, because the party to whom it is first delivered has no authority to deliver it over until the condition be performed. But here there is nothing to indicate any second delivery or any condition, and the case must follow the common rule of law, which is that a deed has effect from the date of the delivery. In *Graham v. Graham* (c), Chief Baron *Eyre* says,—“The counsel for the plaintiff agree that Dr. Graham could

(a) 4 B. & Ald. 440.

(b) 2 B. & Cr. 82; 3 D. & R. 278.

(c) 1 Ves. jun. 724.

not have been compelled to do any act to complete his voluntary bounty; but insist that he had completed the bounty he intended and could not recall it; and particularly his executors could not. At law these bonds must be considered as escrows, to be delivered to the obligee upon the performance of the condition; and then they take effect from their original sealing and delivery; and the rule of law is, that though the obligor and obligee are both dead before the condition performed, yet upon the performance of it the condition is good to charge assets." And he cites as authority for this *Peryman's case*, 5 Rep. 84 b. The case of *Doe d. Garmons v. Knight (a)* bears strongly on the present. It was there held, that where a party to any instrument seals it, and declares in the presence of a witness that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to shew that the executing party did not intend it to operate immediately, except the keeping the deed in his hands, it is a valid and effectual deed; and a delivery to the party who is to take by the deed, or to any person for his use, is not essential. That doctrine is stronger than is necessary to support the present case. And it was also there held, that delivery to a third person for the use of the party in whose favour the deed is executed, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery, although the person to whom the deed is so delivered be not the agent of the party for whose benefit the deed is made. [Lord Abinger, C. B.—If the intent was to commit an act of bankruptcy, the intention has been accomplished, because the execution of the deed would place the goods in the hands of the assignee.] Certainly; the intention is a necessary ingredient in the act of bankruptcy, and must exist at the time of the execution of the deed, and you cannot make a deed fraudulent by matter ex post facto.

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(a) 5 B. & C. 671; 8 D. & R. 348.

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One of the reasons given in the books for the operation of a deed as an escrow, and to what period it shall relate, is, that it shall relate to the first delivery, if it be necessary that it shall so relate in order to give effect to the deed. The first delivery is the delivery to a party to authorize him to deliver it; the second is the delivery of it as a deed; and this, therefore, does not break in upon the maxim that a deed takes effect from the date of the delivery. The parties here are joint-owners, and in the same position as the joint tenants of a real estate. Now suppose this had been the conveyance of a real estate, there can be no question it would have conveyed the two shares of John and Richard from the moment of its delivery. It was expressly held in *Denne d. Bowyer v. Judge (a)*, that, where one devises land to five trustees, to sell and apply the money to certain uses, and afterwards makes the same persons his executors, they do not take the land as executors, but as devisees in trust and joint tenants; and that at any rate the case is not helped by the stat. 28 Hen. 8, c. 4, so as to pass the whole estate upon the production of a conveyance purporting to be executed by the five, but the execution of which by three only could be proved: but that, taking it to be a conveyance by the three only, it would sever the joint tenancy, and convey three-fifths of the estate, to be held in common with the two remaining parts. That is exactly the case before the Court, except that in that case it was a conveyance of a real estate, and in the present it is a conveyance of a chattel. So, in *Hooper v. Ramsbottom (b)*, it was held, that if the vendor of a leasehold estate delivers the conveyance as an escrow, to take effect on payment of the residue of the purchase-money, the property in the title-deeds of the estate is so vested in the vendee, that the vendor, obtaining possession of them and

(a) 11 East, 288.

(b) 6 Taunt. 12.

pawning them, confers on the pawnee no right to detain them after tender of the residue of the purchase-money. That could only have been so held upon the ground that the vendee took an interest in the estate from the very moment of the execution. Now here it is submitted that, where it is intended that three joint tenants should alienate, and two of them execute the deed and the third does not execute it, the two who do so have severed their joint estate by the conveyance, and have passed their interest to the party to whom they conveyed. And there are authorities to shew, that the moment a party executes an assignment of his property, and thereby deprives himself of the means of carrying on his trade and distributing his property amongst his creditors, that moment, although the deed remain in his own possession and is never acted upon at all, he commits an act of bankruptcy. It was so decided in *Botcherley v. Lancaster* (a). There, for all that appeared, the deed never had been out of the bankrupt's possession, and yet it was held to be an act of bankruptcy. And in *Tappenden v. Burgess* (b), it seems to have been decided that a provision in the deed, that it should be void if the trustees should think fit, did not prevent its being an act of bankruptcy. All these cases shew that a deed of assignment is an act of bankruptcy as soon as it is executed. The deed takes effect from the time it is delivered, unless it be delivered as an escrow, and there is no pretence for saying that this deed was delivered with any such intention. This rule therefore ought to be discharged.

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Wortley and *W. H. Watson*, in support of the rule.—
The real question is, whether this deed had any operation at all before the fiat, and whether it operated to transfer

(a) 1 Ad. & Ell. 77; 3 Nev. & Man. 383.

(b) 4 East, 250.

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the property of the bankrupt before the bankruptcy. The question turns on the words of the Bankrupt Act, (6 Geo. 4, c. 16), which, after enumerating various acts of bankruptcy, says—"or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels, or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels, every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made, any of the acts, deeds, or matters aforesaid, with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy." The question therefore is, did this individual before the issuing of the fiat make any gift, delivery, or transfer of any of his goods or chattels. Now the deed purports to be a conveyance by all the three partners of the joint property, in trust for the benefit of their creditors; it is not for the benefit of the separate creditors of each partner, but of the joint creditors of the firm. Until the deed is executed by the other two partners, it is inoperative. There is a power to collect debts granted by the three, and the party cannot proceed to collect them until he has the authority of all three. Then it is an assignment of the partnership property to this trustee to be sold, and he has no power to sell a single particle until the whole three have executed the deed. He has only power to sell the entire stock in trade, and divide the proceeds equally amongst the creditors; so that until the three execute he has no power at all. Suppose one only to execute the deed, the trustee has no power whatever to interfere in the business in conjunction with the other partners. If a deed be not executed according to its intention and object, it is inoperative. [Lord Abinger, C. B.—It is a transfer of all Richard's share of the joint interest, and

it was intended to delay creditors, and is therefore an act of bankruptcy. It would have the effect of transferring all his portion of the joint interest at least. *Parke, B.*—That would be the effect unless you can make out that this deed was delivered as an escrow, not to take effect until all the partners had signed.] We must look at the whole of the deed, to see the object of it; and although the fact of the delivery of the deed as an escrow is not found, yet, as Lord *Eldon* says in *Dutton v. Morrison*, it is in the nature of a deed not to take effect unless the others execute. The question of delivery as an escrow is a question of fact; and it may be inferred from the nature of the deed, as well as from the circumstances that took place at the time. It is not necessary for a person to say “I deliver this deed as an escrow,” or to use any particular words. Richard Potter had no power of transferring the interest in the partnership goods, or to make the trustee a copartner with the others. The deed was only intended to have one operation, and that was as a joint assignment of the whole interest in the stock, to be divided amongst the creditors. It is said that the intent to delay creditors must be co-existent and contemporaneous in all respects with the execution of the conveyance: but that is not correct. There are many cases where the intent may exist at one time in the mind, and the act be made complete at another; in the case of an escrow, the intent to defeat creditors must exist at the time when the deed is completely executed, and becomes no longer an escrow. The intention of the deed may be collected from the deed itself, of which the Court are the judges. This deed shews that it was delivered in the nature of an escrow. One of the powers is to collect debts due to the joint estate: and the trustee could have no such power until the three had executed the deed. Then again, the creditors undertake to accept a dividend; that must be a dividend upon the whole estate, not upon one or two shares of it; and therefore the

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creditors would not be bound by it, and it could not be enforced against Richard Potter only, unless executed by all the parties. And if a party brought an action against Richard Potter, it would be no answer to say that he had executed this deed. In *Dutton v. Morrison*, the deed was not in point of fact ever executed by the third party: and Lord *Eldon* says,—“The question then is, whether, within the principles of those decisions, the deed is an act of bankruptcy; attending to the true intent and effect of it, taken altogether; to what was intended to be done, and to what is to be considered as not intended if the whole that was intended was not capable of being done.” His Lordship therefore looked to the whole of the deed, to collect what the intention of the parties was. And he says, “Admitting that this was not intended to be a several deed, but the creditors, through the mutual agreement of all, were to derive a benefit against each, if two retired from that agreement, and no bankruptcy had occurred, could the creditors have taken advantage of the deed against the one who executed, but who, it must be admitted, did not mean to execute so as to give the deed any effect, unless the others devoted their shares of the property to the same purpose?” Such was manifestly the intention here. It was not an assignment for favouring some particular creditors, but all the creditors, who were to take it in full discharge of their debts, and an assignment by one of the firm could not be enforced against a creditor. Assuming this not to be strictly in the nature of an escrow, it must, from the nature of the deed itself, and from its contents and mode of operation, be taken to have been a deed which the parties could not have intended should take effect at all, unless it were executed by all: and the principle of an escrow is merely that its operation is to be suspended. This instrument comes strictly within that principle, and if

so, it was not before the fiat a complete and perfect conveyance to establish an act of bankruptcy within the meaning of the act, which must be construed strictly in this respect. The cases which have been cited are not in point. *Graham v. Graham* and *Peryman's case* only decided, that where a deed is delivered as an escrow, when it afterwards becomes complete, it takes effect for some purposes from the time of its delivery; but that was not for the purpose of an act of bankruptcy, which is essentially different, but for the purpose of conveying the property. Here, until the execution by all the parties, this condition by the creditors to accept a dividend in satisfaction of all their debts could not take effect, and if so, it could not be enforced against Richard Potter until executed by all, and consequently it was not a perfect deed before the fiat issued. The case of *Denne v. Judge* has nothing to do with the present; it merely establishes that a simple conveyance by three out of five trustees conveys the estate of the three. There were no mutual conditions or stipulations to affect the conveyance. *Hooper v. Ramsbottom* only decided, that when the deed is delivered as an escrow, it is out of the control of the vendor. *Botcherley v. Lancaster* does not appear to have been much discussed, and the only question there was, whether a conveyance, perfect in all other respects, had any operation as a conveyance of the property, notwithstanding it had been kept in the grantor's own possession, and not acted upon or put in force. Those cases therefore do not at all affect this question. But the question here is, whether this conveyance, looking at who were the conveying parties to it, their relative position to each other, and their relation to the parties of the third part, and the object of the deed, can have any effect until it is executed by all; and if so, can it be complete, so as to constitute an act of bankruptcy within the meaning of the act of Parliament, until it is executed by all the three partners?—

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LORD ABINGER, C. B.—I am clearly of opinion that this rule ought to be discharged. It appears to me that the jury have correctly found that this deed was executed by the party in question with a view to delay creditors, and to defeat the object of the bankrupt laws. If a man executes a deed by which he conveys his property away with a view fraudulently to defeat his creditors, or to evade the bankrupt laws, that is an act of bankruptcy. Mr. *Wortley* contends that this deed could not take effect; that it was executed by the last of the three parties who did execute it after the fiat, and therefore that the previous execution goes for nothing. It appears to me, however, that the act of bankruptcy of each party is complete at the time he executes the deed. Suppose the third partner had died before he executed the deed, could that have altered the effect of this deed as regards the other two? They did what in themselves at that moment lay, by the execution of a deed, to convey away their effects in fraud of the bankrupt laws; and the subsequent death of a partner could not alter that act. Richard Potter executed the deed on the 8th, and James not until the 13th. Suppose that between the 8th and 13th Richard had died, and that James had executed the deed in due time before the fiat: Mr. *Wortley's* argument, if it is to prevail at all, would shew that the effect of that would be, that Richard's property did not pass by the deed until such time as the last partner had executed it, and therefore that his property passed to his executors, and vested a beneficial interest in them. I think that such could not be the case. I think the property vested immediately upon the act of bankruptcy, in whosoever

(a) 8 T. R. 507.

(b) 3 Y. & Jerv. 1.

might be the lawful commissioner. If Richard had executed the deed expressly upon a condition that his partner should execute it afterwards, and that had been proved to the satisfaction of the jury, and they had found it to be so, the deed would then have been inoperative till the last partner had executed. But that is not so: the deed is executed by him to take such effect as he could give to it at the moment, and it does pass all his property in the joint effects. Whether the assignee might do with it as the parties intended he should do with it, if the other parties did not execute it, is another question; but surely it vested in the assignee all the property which the executing party transferred out of himself; and therefore even supposing that he alone had intended to commit an act of bankruptcy, would not the conveyance of all his joint interest in that property, which was to pay his debts and his partners', if he made that conveyance with a view to defeat his creditors, have been an act of bankruptcy, though the others had not executed it? It appears to me that it has the effect of vesting in the assignees the whole of such property as he could pass to them by that deed, because he did not deliver it as an escrow, but as a deed to take effect immediately at that moment, and it did then take effect. Though the effect may not be altogether that which he contemplated, yet the legal operation of the instrument is to place the property in the hands of the assignee, and to divest it out of himself. That is all, I think, which is required by the act of Parliament to make it an act of bankruptcy. I cannot consider that there is any evidence in this case of an intention to deliver the deed in the nature of an escrow. There is nothing to shew that Lord *Eldon*, in the case cited, raised a doubt whether that fact might not be inferred, but only whether he could, sitting as Chancellor, say it was an act of bankruptcy without referring it to a jury; he does not say, if the jury were to find that the deed was not delivered as an escrow, but that the party executed and delivered it simply, that

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would not be an act of bankruptcy; the doubt he raises is, whether as Chancellor he ought to infer that to be so without having the intervention of a jury. We have here the jury in a Court of law, who find that the deed was executed with a view to defeat the bankrupt laws.

PARKE, B.—I am of the same opinion, and think this rule must be discharged. With respect to the points to which Mr. *Wortley* has directed a great part of his argument, whether this fiat could be supported if this was a deed executed as an escrow on the 8th of September, and which did not take effect as a complete conveyance until the 18th, and after that period of the day in which the fiat was issued, if that were a question in the case, I own I should concur with him, because I think it necessary, in order to support the fiat, which is grounded on an act of bankruptcy by a fraudulent conveyance, that there should be at the time of it, that is, during every portion of the day on which the fiat was issued, some complete fraudulent conveyance by which the property was divested from the bankrupt; and in the event of this deed having been delivered as an escrow, not to take effect until a condition was performed, which was not performed until a time subsequent to the fiat, I think there would have been no fraudulent conveyance within the meaning of the bankrupt laws, and therefore that the fiat could not be supported. That is on the assumption that this deed is to be held to have been delivered as an escrow. But that is a fact we are not to assume at all, but the reverse; because, on looking at the learned Judge's note, I take it to be clear that this point of delivery as an escrow was conceded by the defendant:—in truth it was a deed executed in the ordinary form as an absolute conveyance, and the only point that was made was, whether a deed which was executed as an absolute conveyance would the less be an act of bankruptcy, because, on looking at the form of the deed itself, you might come possi-

bly to the conclusion, that the parties did not contemplate that the deed should operate as an act of bankruptcy unless the whole partnership effects were conveyed. That, I take it, is the point which is the subject of the reservation of the learned Judge. In this case the execution of the deed was proved in the ordinary form, and I take it now to be settled, though the law was otherwise in ancient times, as appears by Sheppard's Touchstone, that in order to constitute the delivery of a writing as an escrow, it is not necessary it should be done by express words, but you are to look at all the facts attending the execution,—to all that took place at the time, and to the result of the transaction; and therefore, though it is in form an absolute delivery, if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow. That is the result of the two cases cited in argument, *Johnson v. Baker*, and *Murray v. The Earl of Stair*. But there is no fact of that kind in this case; the execution took place in the ordinary way; there is nothing in the circumstances of the case to lead to any inference but that the deed was intended to be executed by each of the partners for himself. What, then, is its legal effect? Here is one of the partners who executes a deed which on the face of it purports to convey for himself and others all the personal property of the partners, and according to the authority in Sheppard's Touchstone, such a deed as that would operate to convey all the separate effects of the person who executed it, that is, of Richard Potter, and it would equally convey all the share that Richard Potter had in the joint effects. That would in point of law operate as an act of bankruptcy. If a man parts with all his personal estate, and all his share in the joint effects of a business in which he acts as a trader, that unquestionably amounts in point of law to an act of bankruptcy; therefore the simple question is, whether, the deed having that operation, if it is to be considered as having been de-

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livered as a deed, there is anything to be collected from the face of the deed itself, from which we can say that it was to have no operation. I own I cannot come to that conclusion. It seems probable the parties contemplated that the other partners should execute the deed, but in the meantime this party has set his seal, and delivered the deed as an instrument which conveys all the property he has, and it must operate as an act of bankruptcy by him. Lord *Eldon's* dictum, in *Dutton v. Morrison*, is not a decided opinion, but merely the expression of a doubt. He would not hold that instrument to be an act of bankruptcy, without sending the case for the opinion of a Court of law. We are sitting in a Court of law, and I think we cannot deny to an instrument executed as a deed the effect of transferring the property of the party who executes it, according to the terms of it; and if that be all the property he has, or all the share he has in the property with which he carries on business, the assignment in point of law amounts to an act of bankruptcy, and operates as such. With all deference for the doubt of such a distinguished lawyer as Lord *Eldon*, in *Dutton v. Morrison*, I own it appears to me, that unless the deed be executed as an escrow, it at once operates to convey all the property the partner has, and therefore is an act of bankruptcy.

ALDERSON, B.—I am of the same opinion. This deed is delivered in the ordinary form, and not as an escrow. There are no circumstances attending the execution of the deed itself which at all have a tendency to shew that it was delivered as an escrow. Then we look into the deed, and we find certain clauses on which the counsel for the plaintiffs rely, which make them conclude that it would been a very convenient thing if it had been delivered as an escrow, for the purpose of carrying into effect more precisely the supposed intention of the parties to the deed;—a very doubtful question; but that is the whole

extent of the argument; and are we, when there are no circumstances attending the actual execution of it to shew that it was executed as an escrow, to infer that it was not executed as a deed, because it would have been convenient that it should have been so executed?

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GURNEY, B.—I am of the same opinion. It appears to me that the deed was quite complete, and that it operated from the time of its execution. I agree, if it had been delivered as an escrow, the case would have been different.

Rule discharged.

GEORGE v. CHAMBERS, REES, and BROWN.

Jan. 24, 25.

REPLEVIN. Plea by the defendants Chambers and Rees, that, after the passing of the 5 & 6 Will. 4, c. 50, (the Highway Act) (a), the plaintiff was a surveyor of

One of the defendants, who were magistrates, having received information on

oath that a certain *turnpike* road was out of repair, summoned the surveyor of the road, under 5 & 6 Will. 4, c. 50, s. 94, to appear at a special sessions. At that sessions the two defendants ordered A. B. to view the road, and report thereon to them at another special sessions. A. B. having reported at the latter sessions, when the plaintiff was present, that the road was out of repair, the defendants ordered the surveyor to repair it within six weeks, and *at the same time* ordered him, under stat. 18 Geo. 3, c. 19, s. 1, to pay 2*l.* 3*s.* as costs. The plaintiff having refused to pay this sum, and his goods having been taken as a distress by warrant from the defendants, he replevied them, and brought the present action of replevin.

Held, first, that a single magistrate had no authority, under 5 & 6 Will. 4, c. 50, s. 94, to summon the surveyor of *turnpike* roads.

Secondly, that the defendants could not inflict costs under the stat. 19 Geo. 3, c. 19, s. 1.

Thirdly, that the defendants were not justified in inflicting costs upon the plaintiff, since, not having disobeyed the order of justices, he had not committed any offence.

Fourthly, that an action of replevin would lie against the defendants.

(a) The 94th sect. of that act enacts, that if a highway is out of repair, a justice, receiving information on oath, may summon "the surveyor of the parish, or other person or body politic or corporate chargeable with such repairs," to appear at a special sessions: that at those sessions they shall either appoint a person to view the highway, or view it themselves; and if

it shall appear, either on the report or view, that the highway is not in repair, they shall convict the surveyor, or other person liable, in a sum not exceeding 5*l.*, and order the surveyor or other person to repair such highway; and in default of such repairs, the surveyor or other person shall forfeit a sum of money equal to the money requisite for the repair of the highway. "Provided

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certain turnpike roads in the parish of Pembrey, which were highways; that one Howells, who was then a resident and inhabitant in the said parish, informed the defendant Rees on oath, that part of the said turnpike road was not sufficiently repaired; that the defendant summoned the plaintiff to appear at a special sessions; that the plaintiff did not appear; that the justices appointed one Thomas to view the road, and report to the justices at a special sessions; that at such special sessions, held before the two defendants on the 13th November, 1841, in the presence of the plaintiff, Howells reported that the road was not in effectual repair; whereupon the defendants made an order, dated the 13th November, 1841, whereby they directed the plaintiff to repair the road within six weeks from the date of the order; that the defendants at such special sessions, after making such order, made another order, in pursuance of the stat. 18 Geo. 3, c. 19 (a), intituled "An Act for the Payment of Costs to Parties on Complaints determined before Justices of the Peace out of Sessions," &c., against the plaintiff, for neglecting to re-

that, if the said highway so out of repair is a part of the turnpike road, the said justices shall summon the treasurer or surveyor, or other officer of such turnpike road, and the order herein directed to be made shall be made on such treasurer or surveyor, or other officer as aforesaid, and the money therein stated shall be recoverable as aforesaid.

(a) "Whereas, by the law now in being, his Majesty's justices of the peace are not sufficiently authorized, on complaints that come before them out of summons, to award costs against either the person or persons complaining, or other person or persons against

whom any complaint is made, as to justice may appertain; it is therefore enacted, that when any complaint shall be made before any of his Majesty's justices of the peace for any county, riding, division, city, town corporate, franchise, or liberty, and any warrant or summons shall issue in consequence of such complaint, that then it shall and may be lawful to and for any justice or justices of the peace, who shall have heard and determined the matter of the said complaint, to award such costs to be paid by either of the parties, and in manner and form as to him or them shall seem fit, to the party injured."

pair the said high roads, and thereby awarded 2*l.* 8*s.* to be paid by the plaintiff to Howells. The plea then averred, that the plaintiff did not pay or give security for the said sum, whereupon the defendants Chambers and Rees issued their warrant to the constables to levy 2*l.* 8*s.* by distress and sale of the plaintiff's goods, and delivered their warrant to the defendant Brown, then being a constable, who took the plaintiff's goods and chattels as a distress for the sum of 2*l.* 8*s.*, until the plaintiff replevied the same, &c.

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General demurrer. The point marked for argument on the part of the plaintiff was, that the justices had no authority or jurisdiction to make the order in the plea mentioned.—Joinder in demurrer.

E. V. Williams, in support of the demurrer.—First, the justices were not authorized to inflict costs under the stat. 18 Geo. 3, c. 19, s. 1, in respect of an offence committed under the 5 & 6 Will. 4, c. 50, for the recital of the latter act shews clearly that it applies only to cases where by the laws then in being costs could not be awarded. Again, to authorize the awarding of costs under the former statute, there must be a "complaint" against some party: in the present case there was none.

Secondly, no offence has been committed. The surveyor is the mere servant of the trustees of the turnpike road, and may have no duty to perform; or it may be that the trustees have no funds, in which case the parish would be liable to repair the road. Besides, for aught that appears in this case, the plaintiff may have complied with the order, and it is clear that until he has disobeyed it, which is not shewn to have been the case here, no offence has been committed. The proceedings, also, are irregular from beginning to end. In the case of a turnpike surveyor, the summons ought to be by more than one justice; here the summons was issued by a single justice.

Thirdly, costs can be given under 18 Geo. 3, c. 19, s. 1,

Exch. of Pleas, only against "the party injured;" but here the informer
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 CHAMBERS. did not answer that description. It ought to appear and be stated, that the party receiving the costs is the "party injured:" *R. v. Justices of Essex (a)*. It is not enough that he is alleged to be an inhabitant of the parish; it ought to appear that he had used the road: *R. v. The Inhabitants of Taunton St. Mary (b)*, *R. v. Incledon (c)*, *R. v. Smith (d)*. Again, the award of costs was illegal, no conviction having taken place, which was necessary to give the magistrates jurisdiction under the stat. 18 Geo. 3, c. 19, s. 1.

Evans, contra.—The surveyor of turnpike roads is liable to be summoned before the justices under the 94th section of the 5 & 6 Will. 4, c. 50, and as he was bound to repair the road, and made no answer to the charge, judgment was properly given against him, and costs inflicted under the 18 Geo. 3, c. 19. The surveyor is the party against whom the complaint was made, and he is the party against whom proceedings are to be taken. The stat. 5 & 6 Will. 4, contemplates the liability of the surveyors of turnpike roads. Here the party, when summoned, does not allege a want of funds, and is therefore to be treated in all respects as an ordinary surveyor of highways. Again, the statement that the informer is an inhabitant is a sufficient averment that he is a party grieved.

But, secondly, the action of replevin cannot be maintained in this case: the proper mode of proceeding is by an action of trespass, wherein the magistrates would be able to justify under 24 Geo. 2, c. 44. Here they intended to act as justices, and ought not to be deprived of the protection conferred upon them by the statute. Again, this distress is in the nature of a statutable execution, and therefore there can be no replevin. Goods taken as a distress for poor rates may, indeed, be replevied; but there

(a) 7 D. & R. 658.

(b) 3 M. & Sel. 465.

(c) 1 M. & Sel. 268.

(d) 3 M. & Sel. 133.

the remedy is expressly given by the stat. 43 Eliz. c. 2, s. 19. In *Wilson v. Weller* (a), the marginal note is as follows: "Where a magistrate has competent jurisdiction and adjudges, and on refusal to pay, issues a warrant of distress and sale, the goods taken under it are not repleviable. Dictum, per *Richardson, J.*" And in *Bac. Abr. "Replevin,"* (C.), it is laid down that "when an act of Parliament orders a distress and sale of goods, this is in the nature of an execution, and replevin does not lie." In *R. v. Monkhouse* (b), the Court granted an attachment against the under-sheriff of Cumberland, for granting a replevin of goods distrained on a conviction for deer-stealing.—He also cited *Selby v. Bardons* (c).

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E. V. Williams was desired to confine his argument in reply to the question whether replevin would lie, and obtained permission to look into the authorities on the subject, and reply on the following day.

Lord ABINGER, C. B.—The plaintiff was the servant of the trustees of a turnpike road, and until he had disobeyed the order of justices directing him to repair the road in question, had committed no offence. The main question is, whether the defendants were authorized in inflicting costs upon him under the stat. 18 Geo. 3, c. 19, s. 1. That act was passed to enable justices, on complaints that came before them out of sessions, to award costs against either the person or persons complaining, or the person or persons against whom any complaint is made, and that is to be done after they "shall have heard and determined the matter of the said complaint." The statute 5 & 6 Will. 4 enables them, without having recourse to this statute, to give costs in a case like the present. But it is plain, by reference to the

(a) 1 Brod. & B. 57; 3 Moore, 294.

(b) 2 Stra. 1184.

(c) 3 B. & Adol. 2.

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94th section of this latter act, that a single magistrate has no power to summon a surveyor of turnpike roads: his power is limited in this respect to the surveyors of highways, who are bound to raise the necessary funds, and are *primâ facie* liable to repair the road, and to those who are liable *ratione tenuræ*, or in any other mode. Such persons are to appear at the sessions, and if it appear that they have neglected to repair the road, may have costs awarded against them. They may then be ordered to repair, and if they omit to do so, may be adjudged to pay a sum of money, which is to be laid out in the repair of the highway. In the case of a surveyor of turnpikes, a different mode is to be adopted. It may become necessary for the justices to examine the state of the turnpike funds. A former statute, 3 Geo. 4, c. 126, s. 109, enables them to transfer the statute duty from turnpike roads to other highways, if it can be conveniently dispensed with, without endangering the securities for the money advanced on the tolls. In such a case it would be proper for them to order the surveyor of turnpikes to repair the roads. If, therefore, the surveyor, when summoned, declares the road to be a turnpike road, it may become necessary for the justices to examine the state of the funds; and if, after having done so, they make an order on him to repair the road, and he disobeys it, then, and not till then, does he become liable to the payment of costs. In the present case, the order has not been disobeyed, and the defendants, therefore, had no authority to award costs. Our judgment must be for the plaintiff.

PARKE, B.—I am of the same opinion. I agree with the Lord Chief Baron that the proper construction of the 5 & 6 Will. 4, c. 95, is, that a turnpike surveyor is to be summoned by two justices, who are to examine the accounts of the trustees, and, on finding the fund to be sufficient for repairs without endangering the securities for the tolls,

may order him to repair the road. If he disobeys that order, he then becomes liable to the penalties which may be levied under the 96th section, and also to costs. But even admitting the correctness of Mr. *Evans's* argument, that a turnpike surveyor may be summoned in the same manner as a highway surveyor, still I think the plea bad. The 18 Geo. 3, c. 19, s. 1, enables justices to award costs against either the persons complaining or the person against whom the complaint is made: they are to adjudicate upon a complaint, and may then award costs. In the case of a turnpike surveyor, they should give him an opportunity of shewing that he has no funds. But here the defendants have not adjudicated upon the matter, for they have not found that the plaintiff was guilty of any misconduct; they have not found that he was bound to repair the road, on the ground of his being in possession of funds for that purpose. The circumstance which is wanting to give them jurisdiction is, that they should have called the surveyor before them, and should have adjudicated that the road was out of repair through his default. Here it appears merely that they made an order, but it is not stated that that order was disobeyed; and therefore no breach of duty appears to have been committed by the plaintiff.

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ALDERSON, B.—I am of the same opinion, and I think the plea is bad in substance. I also agree in the opinions of my Lord, and of my Brother *Parke*, as to the construction of the 94th section. If, indeed, the defendants had attempted under that section to inflict costs on the plaintiff, there would be this difficulty, that they would have to proceed under the 97th section of the 5 & 6 Will. 4, which applies only to the case of an offence having been committed. Here, however, no offence has been committed. The case stands thus:—A. B. gives information to a magistrate that a turnpike road is out of repair, whereupon the magistrate summons the turnpike surveyor to appear. The surveyor was not bound to attend, for the act gives

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authority to the justice to summon none but the parish surveyor, or other person or body politic or corporate chargeable with the repairs of the road. But the trustees of a turnpike road are not chargeable with the repairs in this sense of the word, for they are not liable to indictment. This was decided in the case of *Reg. v. The Inhabitants of Netherthong (a)*, and *Reg. v. The Inhabitants of St. George, Hanover Square (b)*, where it was ruled that the appointment of paving commissioners did not exempt the parish from its common-law liability to repair the highways. The parties *primâ facie* liable are, therefore, the persons to be summoned in the first instance. If the road is reported to be out of repair, the justices are to convict the surveyor in a penalty not exceeding £5, and after that begins their remedial power of directing the road to be repaired. It is at this stage of the proceedings that the surveyor of turnpikes is to be summoned, and if he is adjudged to be liable, he is to be ordered to repair within a certain time, and if guilty of default, he is to forfeit a sum of money equal to the amount required for repairs. The justices may summon the trustees or others acting under the general turnpike acts, the funds in the possession of the latter being in fact a collateral security for the repair of the roads. So, if there be a conviction against the inhabitants, the fine for the repair of the road may be apportioned between them and the trustees, care being taken that the interests of the creditors of the principal trust are not affected. In the case, therefore, of a turnpike surveyor, the magistrates have a discretionary power of considering what course they are to take. If, after investigating the state of the funds, they find the debts of the trust to be inconsiderable, they may direct the surveyor to repair the road within a certain time, and in default thereof may summon him, and impose a forfeiture upon him, which, together with costs, he will then be liable to pay for disobeying the order of justices. But here the plaintiff was not bound to

(a) 2 B. & Ald. 179.

(b) 3 Campb. 122.

pay costs, as the time for repairing the road had not elapsed; and therefore the costs were inflicted before any offence was committed.

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GURNEY, B., concurred.

On the following day,

Williams was heard in reply.—The objection which has been taken to the form of action cannot prevail. It is true that in one sense goods taken in execution cannot be replevied, because the Court would attach the parties for contempt; but it does not therefore follow that replevin will not lie. In many cases in the old books we find it stated that an action *will not lie*, and the meaning clearly is, that the remedy is altogether misconceived; as, for example, an action of trespass for an injury to the reversion. An action of debt might be said, in one sense, not to lie after the debt was paid: so an action of trespass after legal satisfaction. In the same sense it may be said that replevin does not lie for a distress levied under an act of Parliament, because the justices' adjudication is conclusive. There is a distinction between an objection to the *form* of the action and an objection to its *maintenance*. The earliest authority on this subject is *Bradshaw's case* (a), in which it was ruled, that in the case of an execution, if the sheriff granted a replevin, though it did not lie, yet the Court would not grant an attachment for contempt. Later cases shew that a different rule has since prevailed: *Rex v. Burchet* (b), *Rex v. Monkhouse* (c), *Rex v. Oliver* (d). In *Pearson v. Roberts* (e), it was held that an action of replevin to recover damages was within the 24 Geo. 2, c. 44; but subsequently the Court undoubtedly held that that statute did not apply to replevin: *Fletcher v. Wilkins* (f). In Tidd's Practice, the rule is

(a) Cited in Bac. Abrid. "Replevin," (C.)

(b) 8 Mod. 209.

(c) 2 Str. 1184.

(d) Bunbury, 14.

(e) Willes, 668.

(f) 6 East, 283.

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thus stated:—"Where an act of Parliament orders a distress and sale of goods, as for a penalty after conviction on the game laws or on the highway act, or for a fine imposed upon an officer by commissioners of land-tax, or for the wages of labourers on the stat. of 20 Geo. 2, c. 19, this is in the nature of an execution, and the conviction being conclusive, a replevin will not lie; but the Court in these cases will not stay, though in some of them they granted an attachment for contempt against the officer for granting, and the party for obtaining a replevin." In Buller's *Nisi Prius* (a), it is said that replevin may be brought in any case where a man has had his goods taken from him by another; and the law is so laid down in Com. Dig., tit. "Replevin." In the case of *Shannon v. Shannon* (b), Lord Redesdale says, that replevin is not confined to a taking by distress alone, but is an action which may be founded upon any taking by the party. The language of the 19th sect. of the 43 Eliz. c. 2 shews that the legislature considered that replevin would lie for a poor-rate.—He then cited *Aylesbury v. Harvey* (c), *Fenton v. Boyle* (d), *Banks v. Brand* (e), *Attorney-General v. Brown* (f), *Morell v. Harvey* (g), and *Morrell v. Martin* (h), the last of which cases was precisely similar to the present, and arose upon the same act of Parliament.

LORD ABINGER, C. B.—I think it is very remarkable that this objection was never taken, when cases were decided in favour of the plaintiff in replevin. The farther we look back into the authorities, the less we find any trace of such an objection, and I think it is too late now to raise the question. In the present instance the doubt has arisen only upon the stat. 24 Geo. 2, which it has been decided does not apply to this case; but the answer is, that that

(a) Page 52.

(b) 1 Scho. & Lef. 327.

(c) 3 Lev. 204.

(d) 2 N. R. 399.

(e) M. & Sel. 525.

(f) 1 Swanst. 265.

(g) 4 Ad. & E. 684.

(h) 3 Man. & G. 581.

statute, while it gave a certain protection, did not destroy any remedy or right of action previously existing. It cannot be contended that the statute of Elizabeth *gives* the action of replevin because it gives a form of plea, any more than it gives an action of trespass because it gives a form of plea. Mr. *Evans* contended that, inasmuch as an avowry under that statute must be sustained by the statute itself, it therefore gives replevin. Mr. *Williams's* argument is more legitimate, viz., that it recognises the right to bring replevin as well as trespass. It is unnecessary to decide whether replevin will lie if goods are taken under a conviction which is valid; it is enough for us to decide, that if the magistrate has not jurisdiction, either replevin or trespass will lie; and the former has this advantage, that the party in that form of action can recover back his goods without a sale being made. In the case of an execution issuing from a superior Court, the order of the Court, that the sheriff shall levy the money, shews that the law never intended a replevin, which would frustrate the order of the Court. In the case of a warrant of distress, the money is first demanded, and if the party does not pay, a distress is levied on his goods. I think there is a material distinction between the two forms of action, and that we ought not to deprive a party of his right to replevy, unless we are compelled to do so by the terms of the statute, which seems to me to have been made alio intuitu than to take away any such right.

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PARKER, B.—I am of the same opinion. The question now to be decided is, simply, whether goods taken under a *pretended* authority can be replevied. *Primâ facie* there is no doubt that they can; for though in ordinary practice it is applied only to a distress for rent, yet a replevin is, at common law, a remedy applicable in all cases where goods are improperly taken. And I find no satisfactory authority to shew that it will not lie where goods are improperly taken under the warrant of a justice. In some cases, no doubt,

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the Court will interfere to prevent a replevin to save its process from being defeated. The rule is correctly stated in Chief Baron Gilbert's Treatise on Replevin, p. 138, where it is said, "If a superior Court award an execution, it seems that no replevin lies for goods taken by the sheriff by virtue of the execution; and if any person shall pretend to take out a replevin and execute it, the court of justice would commit them for contempt of their jurisdiction, because by every execution the goods are in the custody of the law, and the law ought to guard them, and it would be troubling the execution awarded, if the party on whom the money was to be levied should fetch back the goods by replevin, and therefore they construe such endeavours to be a contempt of their jurisdiction, and upon that account commit the offender; that is, if a person attempt to defeat the execution of the Court, they will treat it as a contempt, and punish it by attachment of the sheriff." But Chief Baron Gilbert also says, "that in cases in which there is no jurisdiction, the goods may be replevied." That is a sufficient authority. If the plea does not disclose a good defence, the defendants must stand in the same situation as an ordinary wrong-doer. I do not attach much importance to the fact of there being cases in the books similar to the present, and in which this point has not been adverted to; the case of *Fenton v. Boyle*, however, and the opinion expressed by Lord *Redesdale* in *Shannon v. Shannon*, are certainly of considerable weight. The defendants here have unjustifiably seized the plaintiff's goods, and I think we cannot say that replevin will not lie.

ALDERSON, B.—I am of the same opinion. It appears to me that there may be ground for saying that there is some matter which may be pleaded in justification; but it does not therefore follow that replevin will not lie. That is the whole extent of the authorities that have been cited, which however were brought under the consideration of the Court of Common Pleas, in the case of *Morrell v. Martin*,

and not considered of sufficient weight to prevent the Court from sustaining the action. It is true, replevin will not lie where there is a judgment of a superior court; for if you replevied on the first judgment, you could do so on the judgment upon that also; and so there would be replevin on replevin ad infinitum. It is different in the case of an inferior jurisdiction, which is to be set right by the superior.

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Judgment for the plaintiff.

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Jan. 28.

ASSUMPSIT on a memorandum of agreement, by which (amongst other things) it was agreed by and between the plaintiff and the defendants, for and on behalf of a company called the Tees Cotton Company, that the plaintiff should be and he was thereby appointed manager of the said company; that his duties should comprise the spinning and manufacturing of cottons and yarns, the superintendence of the machinery and steam-engines, and the general management of the purchases and sales of cotton and manufactured goods, subject to the board of direction which might be appointed by the said company; that his salary should be £300 per annum, payable quarterly, to commence on the 1st day of May then instant, together with a further sum of five per cent. upon the net profit of the said company, payable yearly; that the agreement should continue in force for

Where an agreement contained an attestation clause, and, subjoined to it, the name of a person as an attesting witness, but the name was written in pencil, and not by the supposed witness, but by one of the parties to the instrument:—*Held*, that there was no *prima facie* evidence of there being an attesting witness, so as to render it necessary to call the supposed witness, and that the

signatures of the parties might be proved by other evidence.

To an action against the defendants, proprietors of a cotton manufactory, for refusing to employ the plaintiff as manager pursuant to agreement, and discharging him from their service before the period mentioned in the agreement; the defendants pleaded, that the plaintiff so wrongfully, disobediently, and unskilfully conducted himself as such manager, that they, the defendants, suffered and sustained great loss, to wit, to the amount of £1000, &c.:—*Held*, that, in order to support such a plea, it was necessary to shew, not only disobedience, but such disobedience as occasioned a loss, and there being no evidence of any loss, that the plea was not supported.

Where there has been disobedience, or an act of misconduct by a servant, known to the master at the time he discharges him, although the master does not mention that as the precise ground of discharge, he may afterwards, by shewing that the fact existed, and that he knew it, justify such discharge: but *semble*, that it is otherwise where the act of misconduct was not known to the master at the time of the discharge, as it could not then be the cause of it.

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seven years from that present time, and either party desirous of then discontinuing it, should give to the other party six calendar months' notice in writing:—and the breach alleged was, that although the plaintiff did, from the time of making the agreement, act as the manager of the company for a certain time, to wit, until the 20th January, 1831, and although he was ready and willing to continue to act as and be such manager, and to perform and fulfil every thing on his part to be performed, whereof the defendants had notice, yet the defendants did not nor would, nor would the said company, continue the plaintiff in their service for the time and on the terms in the agreement contained, but neglected to continue him in their employment, and discharged him therefrom. There were also counts for work and labour, and on an account stated.

Pleas, first, non assumpserunt; secondly, to the first count, that after the making of the agreement, and before the refusal and discharge therein mentioned, to wit, on &c., and on divers other days and times, &c., he, the said plaintiff, *so negligently, carelessly, wrongfully, disobediently, and unskilfully conducted himself, as such manager, towards the company, that the said company suffered great loss, to wit, to the amount of £1000, and great personal and other inconvenience in and about their business; wherefore, and because at the said time when, &c. the plaintiff continued so to conduct himself, the defendants refused to continue him in their said employment, and dismissed him therefrom. There were also three other special pleas, on which nothing ultimately turned upon the argument.*

The plaintiff to the second plea replied *de injuriâ*.

At the trial before *Maule, J.*, at the Liverpool Summer Assizes, 1842, the agreement was produced in evidence, signed by the defendants, whose signatures were proved. There was at the bottom of the agreement the form of an attestation, as follows:—"Signed, sealed, and delivered by the said parties, in the presence of——," and then followed the name "W. Smith, jun.;" but there was no seal or

mark, and the words "W. Smith, jun." were written either in pencil or very pale ink, and were proved to be in the handwriting, not of Mr. W. Smith, who was the son of one of the defendants, but of the plaintiff. It was objected for the defendants, that, as there appeared to be an attesting witness, he ought to be called, and without that the agreement could not be read in evidence: to this it was answered, that as the words "W. Smith, jun." were in the handwriting of the plaintiff, it must be taken as if there was no attesting witness. The learned Judge refused to stop the cause, but reserved the question for the opinion of the Court, giving the defendants liberty to move to enter a nonsuit on that ground. The cause then proceeded, and it was proved that the plaintiff had acted as manager for the defendants from May, 1839, until the 20th of January, 1841, when, having been taken to prison for debt, they afterwards dismissed him. Evidence was given of the plaintiff's competency and skill, and of the services he had rendered. The defendants, in answer, proceeded to shew the wrongful, unskilful, and disobedient conduct, on which they relied as a justification for discharging the plaintiff; and amongst other acts, a letter written by the plaintiff to certain persons of the name of Sharrocks & Co., who had a claim on the defendants for machinery sold to them, was given in evidence, to shew that he had acted disobediently. It appeared that Messrs. Sharrocks & Co. having applied to the defendants for the payment of their account, Skinner, one of the defendants, made some objections to the settlement of it, and refused to give them a bill in payment; but the plaintiff, as appears by the letter, in defiance of this, sent them a blank acceptance. The letter was as follows:—

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"Stockton-on-Tees, May 20, 1840.

"Gentlemen,—Mr. George Skinner being the only director present yesterday, I named to him your request for money; his reply was, that as you were shareholders

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for ten shares, of course you ought to allow the amount per share upon your shares to remain according to the instalments paid, being £39, amounting to £390; and as only six engines were come to hand, and they not fixed, he could not see how the directors could for one moment meet your wishes; that as soon as you had sent in your machinery, you might have the balance in cash of the amount of your account, deducting value of your shares. So far for Mr. George Skinner's opinion. I have, on my own responsibility, taken upon me (without his knowledge, as I have power by virtue of my agreement with the company) to accept a stamp, which you may value for on account to any sum most agreeable to your own purposes, from £150 to £199, taking care to let me know the precise amount; and, if it will serve you, I will repeat it, to make up the amount to £300. So soon as you send in your mules, say two pair, I will get you a cash payment. If you come over you will injure your own case, as, I repeat, I can better serve you than you can yourself. In haste,

"I am yours truly,

"GEORGE CUSSONS."

It appeared that Messrs. Sharrocks & Co. did draw the bill for £200, and that the bill was paid by the bankers of the defendants in consequence of a written order of the plaintiff to that effect. It was contended, that the accepting of a blank bill was a wrongful act which no clerk or manager ever could have authority to do, even if he had authority to accept bills generally, which was not shewn, and that this was a direct act of disobedience in the face of orders to the contrary, which had just been given him by one of his employers.

The learned Judge, in summing up, said, that if the plaintiff was dismissed without any of the causes alleged on the record, he was entitled to compensation; and, after commenting on the evidence, he proceeded to observe on the affair of the bill. He said—"The letter which has been put in rather shews that, perhaps, in the terms of the sale

a bill might have been part of the contract. The agreement is, that he is to have the management of the sales under the direction of the board. Now, Mr. Skinner, whom they say he disobeys, is not a board, and therefore there is nothing to shew that he had not authority to act as he did. I will not say there is no evidence, but it is extremely slight. If you think the defendant has failed in making out his defence, then the plaintiff will be entitled to compensation for the non-performance of the contract." The jury found a verdict for the plaintiff, damages £470.

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Knowles, in Michaelmas Term, obtained a rule to enter a nonsuit, on the ground that the agreement was not admissible without calling the attesting witness, and also a rule to shew cause why there should not be a new trial, on the ground of misdirection.

Wortley, Cowling, and Atherton now shewed cause.—It is a question for the judge whether he is satisfied that there is an attesting witness to an instrument or not. Here the learned Judge appeared to be satisfied that there was no attesting witness. The only suggestion was that he was a marksman; but that was rebutted by the fact that he could write, and that there was no mark. There was likewise no designation or address of the witness. In *Fosset v. Brown (a)*, where the defendant brought a bond to the plaintiffs' counting-house, subscribed with two names as witnesses to the execution, and it appeared on inquiry that no such persons were in existence, Lord *Kenyon* said that the plaintiff was at liberty to give evidence of the defendant's handwriting, and the bond was proved. That shews it is a question for the judge, whether there be an attesting witness or not. The evidence here clearly shewed that there was no attesting witness: it was a mere memorandum written by the plaintiff, as the person who it probably was intended should be a witness to the agreement.

(a) Peake's N. P. C. 33.

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Secondly, the allegation in the second plea is, that the plaintiff so negligently, wrongfully, disobediently, and unskilfully conducted himself, that the company sustained great loss. But the defendants did not prove that they had sustained any loss whatever. In order to support that plea, they were bound to prove both disobedience and loss. The question was not merely whether there was any wilful disobedience, but whether there was disobedience accompanied by a loss. But even if it were otherwise, there was no evidence of any wilful disobedience. It is not shewn that there was any regulation of the company that the manager should not draw bills, and no disobedience of any orders of the board was shewn. If the plaintiff had not authority to draw bills, the bankers would not have paid the bill. There was no misdirection on the part of the learned Judge, and the plea was not supported by the evidence.

Knowles and S. Temple, contra.—First, it is a universal rule, that the subscribing witness to an instrument must be called before it can be read in evidence, unless he be dead or his absence be accounted for. [*Parke, B.*—Is there *primâ facie* evidence of there having been an attesting witness in this case? The name is in pencil, in the handwriting of the plaintiff. It was, no doubt, originally intended that there should be an attesting witness, but that intention was apparently changed.] The circumstance of the plaintiff's having written the name makes strongly against him. In the case of *Fosset v. Brown*, there were no such persons as the supposed witnesses in existence; but here the person was well known, and upon the spot, and could easily have been called. There was nothing therefore to take this out of the general rule, which is thus laid down in *Starkie on Evidence* (a):—"If the deed or instrument produced purport to have been attested by one or more witnesses, whose names are subscribed,

(a) Vol. I. p. 320, 2nd edit.

the party must call at least one of the witnesses." Now clearly this instrument purported to be attested by W. Smith the younger, and there was such a person in existence. The plaintiff's attorney saying he believed it to be in the handwriting of the plaintiff, proved nothing to take the case out of the general rule. There is no reason to assume that there was no attesting witness. The instrument purports to have an attesting witness to the execution of it: there is the attestation clause, and the name of the witness subjoined. The name being in the handwriting of another party does not prove that it was not the act of the attesting witness. He may have availed himself of the hand of another party, a thing which is done every day. Secondly, the letter written by the plaintiff was ample evidence of his disobedience to his employers, for which they had a right to discharge him. It appears from the letter that Mr. Skinner, one of the plaintiff's employers, had refused to give a bill to Sharrocks & Co. in satisfaction of their claim, yet the plaintiff, in defiance of that, sent them a blank acceptance. That was a wrongful act, and a direct disobedience to the orders of his employers, of which he was fully aware, and which fully justified them in discharging him. The learned Judge said there was nothing to shew that the plaintiff had not authority to act as he did. But the question was, not whether he had *no* authority to accept bills, but whether he *had* authority, because *prima facie* he had none. The appointment of a person as manager does not give him authority to accept bills, and more especially bills in blank, which might be filled up with a larger amount than the defendants were indebted. It was a strong act of disobedience to do so in the face of direct orders from one of his employers, and was a good ground for discharging the plaintiff, without proof of any loss having resulted from it.

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LORD ABINGER, C. B.—With respect to the first point,

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it appears to me that the subscribing witness is essential, not precisely for the reasons stated by some of the counsel, but because the party to whose execution he is a witness is considered as invoking him as the person to whom he refers to prove what passed at the time of the attestation : consequently, if there was a subscribing witness to the signature in this case, he ought to have been produced to prove it. Now it appears on the evidence, that the supposed witness's name is written in pencil, and it appears also that it was written by the plaintiff, and that a person of that name, who was connected with the parties, was able to write. If this man was a witness to the agreement, he must have been present when the parties signed it, and if so, why should he not have signed it in ink? If he was present, and they did not desire him to be a witness, then he is not the attesting witness to their execution. It is not the mere presence of a person at the time of the execution of an instrument that makes him an attesting witness, for if five hundred persons were present, if they do not sign as attesting witnesses, you are not bound to call one of them ; you may prove the hand-writing of the parties. Therefore, if Smith had been present and seen them all sign, but only put his name afterwards as a witness when the whole matter was over, that would not make him an attesting witness ; but when you add the fact, that the plaintiff himself wrote the name, and that this Smith whose name purports to be written can write, is it not the strongest possible case for inferring that he was not present when the defendants signed the agreement? That being the case, it appears to me to be a document without a subscribing witness.

Then as to the second point. This plea alleges disobedience to be the cause of the plaintiff's discharge. What act of disobedience is shewn in this case, excepting the act alleged, which is said to be proved by the plaintiff's own letter? But it is admitted by the counsel on both sides, that the defendants never discovered that act till after they dis-

charged him. How, then, can they urge that that was the cause of his discharge? It is agreed that the plea could only be sustained by evidence that that was the cause of his discharge. If the defendants knew it before, and passed it over, and allowed the plaintiff to remain to the 1st of August, he would still be entitled to all his wages up to that time. If the defendants did not know it, it clearly was not the cause of his discharge. That is the immediate answer. But there are also the other answers, that there is no specific act of disobedience specified in this plea, but only a general charge of such disobedience as occasioned great loss. You could not sustain the plea, even if you had proved disobedience, unless it had been followed by a specific loss. The allegation of the plea is not that the defendants discharged the plaintiff because he accepted the bill of exchange against orders, not that he disobeyed them by paying a sum of money without orders, but that he disobediently conducted himself in such a manner as that the defendants sustained loss by it. The vagueness of that plea makes it essential that evidence should be given to shew that the defendants had sustained the loss thereby, otherwise they do not prove their plea. I admit that the misconduct is very great of a man in such a situation accepting a bill in blank, because it tells the party that he may fill it up with any sum under a certain amount. That certainly can in no sense be right; but at the time he did it, it does not follow that he had a fraudulent intention. He may have differed with Mr. Skinner about the propriety of paying the account of the person to whom that blank stamp was addressed; but it appears the bill was paid, and as he remained in their service till the month of January afterwards, have the defendants a right to call on the Court and the jury to assume that they remained in utter ignorance of it from that time until the time of his discharge, and therefore did not know what sum was paid? We cannot, I think, in favour of their own negligence and of their own ignorance of busi-

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ness, make any such presumption. It is admitted that the bill was paid in August, and it must be presumed that they were aware of the payment long before they discharged him, and that they at least acquiesced in the propriety of paying his demand at that time *pro tanto*. Now there is no point of misconduct in the plaintiff alleged, except the impropriety of accepting an undrawn bill. I admit that to have been wrong; and it would have been a very justifiable cause of discharging him the next day after they had discovered it, but they did not discharge him. The plea which is now attempted to be supported on that ground, does not allege that that was the cause of the discharge, and in fact he was not discharged until the month of January after. Upon the whole, therefore, I am of opinion that the learned Judge was quite correct in his direction on this occasion, and that the jury found rightly upon it.

PARKE, B.—I agree with the Lord Chief Baron that this rule ought to be discharged. The first objection, and that to which the Court paid most attention on the shewing cause, was, that in this case there was *primâ facie* evidence of there being a subscribing witness to the agreement upon which the action is brought, and therefore that it was incumbent on the plaintiff to call that subscribing witness, or to shew by negative evidence that there was no subscribing witness. When the matter is investigated, it appears to me to be clear that there was no *primâ facie* case of there being a subscribing witness. Whether my Brother *Maule* was of that opinion, or whether he left that point to be decided by the Court, appears to me to be immaterial; for, supposing the point is to be decided by the Court, my opinion distinctly is, upon this evidence, that there was no *primâ facie* case of a subscribing witness. In the first place, the name is in pencil, and not in ink. Generally speaking, if there has been a subscribing witness, his name is in ink. In the next place, it is shewn that this name in pencil is not the handwriting

of the person whose name it purports to be. I take it to be clear, that, as to all these collateral matters, it is competent for the defendant to give evidence as well as the plaintiff; therefore there is here proof that "W. Smith, the younger," is not the handwriting of W. Smith, the younger, but the handwriting of the plaintiff. In the next place it appears, if he is the subscribing witness to anything, he was subscribing witness to the sealing of the instrument; but there was no seal to it; and therefore, putting all those facts together, I am clearly of opinion that the proper inference to be drawn is, that it was *intended* he should put his name as a subscribing witness—that is, as my Lord has already stated, that he should be the conventional witness between all the parties; but that that was not done which was intended to be done; and that it was unnecessary in such a case for the plaintiff to call the person whose name is so written in pencil. Therefore, with respect to the execution of the instrument, it was perfectly competent for the plaintiff or the other parties to prove it by evidence of the handwriting of the defendants alone. Then another point is made, with respect to the alleged act of disobedience on the part of the plaintiff. It does not amount to misdirection, but it is said that the learned Judge treated the case as not sufficiently made out on the part of the defendants, although he did not withdraw that question from the consideration of the jury. We could not grant a new trial, supposing the learned Judge was wrong in that respect; but there was really no misdirection at all. I agree with my Lord as to what it was necessary to shew, in order to support the plea. Here is a plea which in general terms states that the plaintiff was guilty of neglect and disobedience, by reason whereof the defendants incurred a great loss, and therefore they discharged the plaintiff from their service. Now, in order to support that plea, it would be necessary to shew that the disobedience was of such a character as to cause a loss to the company, unless every act of disobedience would warrant them

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in discharging their servant. If every act of disobedience would warrant them in discharging the servant, then it is only necessary to prove, in order to support this plea, that there had been such act of disobedience; but if it is not every slight act of disobedience, but a wilful disobedience, then that is not averred in this plea. If indeed there were an act of disobedience which was followed with loss to any considerable extent, that would warrant the discharge; I do not think that in this case the defendants could rest their case on wilful disobedience at all, because there is no averment of wilful disobedience in the plea. But supposing that were unnecessary, it appears to me that the observations made by the learned Judge are correct, that there really is no proof of wilful disobedience in this case. There has certainly been an act of great misconduct, in putting the name of the company to a blank bill; but I do not think that can aptly be termed by the name of wilful disobedience, unless something more be shewn in the case. But even supposing it was, it does not appear to me that the plea is adapted to meet such a case as that; I therefore think this plea is not supported. Then my Lord has observed, and in that also I concur, that if there was any disobedience on the part of the plaintiff, that is not the act for which he was discharged. Now, I am aware it has been decided, and I am satisfied with that decision, that if there were disobedience, or an act of misconduct by a servant, known to the master at the time he discharges him, although he does not insist on that as being the precise ground of the discharge, he may afterwards, by shewing that the fact existed, and that he knew it, justify such discharge. That has been decided by the Court of Queen's Bench in the case of *Ridgway v. The Hungerford Market Company* (a). But taking that to be so, it would be necessary for the defendants, who justify the discharge, to shew that at the

time the discharge took place in January, 1841, they knew at least of this act of misconduct. There really is no proof in the case of that, but on the contrary, I think the inference is from the plea itself that they did not know of it at the time the plea was pleaded, because I am satisfied, that if that had been known to the person who framed this defence, instead of resting on the general allegation of neglect and disobedience in the general terms in which the plea was pleaded, he would have pleaded specifically that he had been guilty of the act of accepting the bill in blank without the authority of the company. I feel therefore quite assured, not only that this was not the cause of the discharge, but that it was not even known at the time the discharge took place. It would, in truth, be a sufficient answer to this objection to say, that the learned Judge has been correct in the law which he laid down to the jury, and that the jury have found their verdict upon it.

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ALDERSON, B., and GURNEY, B., concurred.

Rule discharged.

GIBBONS v. SPALDING.

Jan. 30.

AN order had been made by Gurney, B., for holding the defendant to bail under 1 & 2 Vict. c. 110, s. 8. The affidavit on which the order was obtained, which was made by the plaintiff, stated "that the deponent had been informed by one Isaac Davis, of 97, Bond Street, in the county of Middlesex, whom he knew to be the intimate friend of the defendant, and which information the plaintiff believed to be true, that the defendant intended to leave England for Brussels, in the kingdom of Belgium, and that from day to

An order for the arrest of a defendant, under the 1 & 2 Vict. c. 110, s. 3, may be made on an affidavit of the plaintiff, that he has *been informed and believes* that the defendant is about to leave England, provided it state the

name and description of the person from whom he has received such information.

On application to the Court to rescind an order for the arrest of a defendant, fresh affidavits may be used on both sides.

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day it was uncertain at what time he would leave, and that he might even have left at the time of swearing the present affidavit." An application was subsequently made to the same learned Judge at chambers for the discharge of the defendant, under the 6th section of the act, but the summons was discharged.—On a former day, (Jan. 11),

Thesiger moved to rescind the above orders, on the ground of the insufficiency of the affidavit. The intention of the legislature in passing the stat. 1 & 2 Vict. c. 110, was to abolish arrests on mesne process in all cases except those provided for by the 3rd and 7th sections of the act. It is the duty of a party seeking to arrest a defendant under those sections, to bring his case within them by clear and legal evidence; and an order to arrest a party ought not to be made on ex parte and hearsay statements. In *Harvey v. O'Meara (a)*, *Coleridge, J.*, says, "It may often happen, and in this case it may so happen, that the means of securing the debt may be lost by a refusal to order the arrest; the Judge may wait for evidence of a design to leave the country till it is too late to prevent its accomplishment; but still he must deal with the act as he finds it worded. Its general intent is to abolish arrests on mesne process, the cases provided for by the 3rd and 7th sections are but exceptions, and he must see the case fairly brought within them."

PARKE, B.—We think evidence of this nature is a sufficient foundation for orders like the present, and it is every day's practice to make them on such evidence. In many cases it might be difficult, if not impossible, to procure better, and if we were to establish such a rule with respect to these affidavits we should render the statute a dead letter. There is, however, this limitation to hearsay evidence, that no Judge ought to make an order of this description merely upon the plaintiff's swearing that he is

(a) 7 Dowl. P. C. 725.

informed and believes that the defendant is about to leave the country; the plaintiff should be required to state in his affidavit the name of the person giving him that information. The Judge then has before him information which the defendant has the means of afterwards explaining or denying, and if he can do so, he will be of course discharged.

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On this point, therefore, the rule was refused, but a rule nisi was granted on the merits, against which

The *Attorney-General* now shewed cause, and was proceeding to read new affidavits which had not been used before the learned Judge at Chambers, when

Thesiger interposed, and contended that fresh affidavits could not be read, inasmuch as the present application was merely in the nature of an appeal from the decision of the learned Judge, under the 6th section of the act; the Court having no jurisdiction to make an original order for the arrest of a defendant.

The *Attorney-General*, contrà, insisted that the admission of fresh affidavits was altogether for the discretion of the Court; that they might have been used if the defendant had applied to the Court, instead of to a judge at chambers, for his discharge, and therefore that they would properly be admitted in the present case.

PARKER, B.—The party who seeks to detain the defendant in custody is certainly at liberty to use other affidavits than those which were brought under the consideration of the judge. Suppose that, when before the judge, the defendant had denied that he intended to go abroad, but he had afterwards expressly admitted that to be his intention, would it be right in the Court to discharge him?

ALDERSON, B.—I entertain no doubt that both parties

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are at liberty to use fresh affidavits. The object of the Court must be to ascertain all the facts correctly, that they may determine, upon satisfactory grounds, whether the judge's order is to be set aside or not. Suppose, after the making of the order, it were discovered that the affidavits used before the judge were false, ought not that circumstance to be brought before the Court?

Lord ABINGER, C. B., and GURNEY, B., concurred.

The case accordingly proceeded, and ultimately the rule was discharged (a).

(a) In *Heath v. Nesbitt*, in Trinity Term, 1843, the Court, after referring to this decision, said that although additional affidavits might be used, the former affidavits ought also to be brought before them.

Jan. 28.

A party has no right to enter upon the land of another in order to abate a nuisance of filth, without previous notice or request to the owner of the land to remove it, unless it appear that the latter was the original wrong-doer, by placing it there, or that it arises from a default in the performance of some duty or obligation cast upon him by law, or that the nuisance is immediately dangerous to life or health.

JONES v. WILLIAMS.

TRESPASS qu. cl. freg.—Fourth plea, that the defendant, before and at the said time when &c., and from thence hitherto, hath been and still is lawfully possessed of a certain messuage and dwelling-house, with the appurtenances, adjoining and near to the said close in which &c., in which the defendant and his family, at the said time when &c., and from thence hitherto, have inhabited and dwelt, and still do inhabit and dwell, and wherein the defendant, during all the time aforesaid, carried on, and still doth carry on, the trade and business of a brewer; and because the plaintiff, before and at the same time when &c., injuriously and wrongfully permitted and suffered divers large quantities of dirt, filth, manure, compost, and refuse, to be, remain, and accumulate in and upon the said close in which &c., by reason whereof divers noisome, offensive, and unwholesome smells, vapours, and stench, before and at the said time when &c., ascended and came from the said close in which &c., unto and into the said messuage and dwelling-house,

and premises of the defendant, to the great damage, nuisance, and annoyance of the defendant and his said family, so inhabiting and dwelling therein, and to the great injury, prejudice, and annoyance of the defendant in his said trade and business of a brewer, he the defendant, at the said time when &c., so entered into the said close in which &c., to remove and abate the said nuisance, &c., [proceeding to justify the trespasses alleged in the declaration, and concluding with a verification.]

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Replication, de injuriâ.

At the trial of the cause before *Gurney*, B., at the last Denbighshire Assizes, the defendant had a verdict on this issue.

In Michaelmas Term, *Erle* obtained a rule to shew cause why the judgment should not be entered for the plaintiff, non obstante veredicto : against which

Jervis and *Welsby* shewed cause (Jan. 19).—The argument in support of this rule will be, that this was a nuisance of *omission* only, and not of *commission*, and that, therefore, a notice or request to the plaintiff was necessary before the defendant proceeded himself to abate the nuisance, and should have been averred in the plea. The case of *The Earl of Lonsdale v. Nelson* (a) will be relied upon in support of this view. But in truth, there is no distinction between nuisances of omission and of commission ; and even if there were, the words used in this plea, that the plaintiff “permitted and suffered the filth &c., to accumulate,” import an act of commission, and are not distinguishable from the words “put and placed ;” in either case, the nuisance consists in bringing the premises into such a state as to generate filth. The case of *The Earl of Lonsdale v. Nelson* is the first in which a distinction between nuisances of omission and of commission is ad-

(a) 2 B. & Cr. 302 ; 3 D. & R. 566.

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verted to; it is there put in argument only, and is not adopted by any of the Judges except *Best, J.*, and the case was decided on other grounds. There the right claimed was to enter and repair a pier in a navigable river, which is very different from the right to abate a nuisance like the present. In the argument on the part of the plaintiff in that case, after citing authorities to shew that an assize of nuisance did not lie for neglect, but only for an act of commission, it is said that, "where a party may have an assize of nuisance, he may, if he chooses, enter and redress the injury himself; but where he cannot have assize, there is nothing to shew that he can enter." But that proposition does not appear to be universally true; for example, in the case of trees overhanging another man's land, an assize would not lie, and yet the nuisance to the land may be abated at any moment, by cutting the trees: *Bro. Abr., Nuisance, 28; Morrice v. Baker (a)*. [Lord *Abinger, C. B.*—There is no entry in that case; the party cuts the trees from his own land.] It was further argued in the same case, that such a work as a pier might sustain sudden injury, as by a storm, and that to allow any person to enter and repair it the next day, without notice and reasonable time allowed for that purpose to the owner, would be highly inconvenient. That case, therefore, is in all respects widely different from the present. Here the plaintiff is not bound to act upon the notice if it be given, and therefore the giving of it would appear to be a merely nugatory act. It may be essential to life or health that a nuisance of this nature should be abated instantly. In 3 Bla. Comm. 5, it is said—"Whatsoever unlawfully annoys or doth damage to another, is a nuisance, and such nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commit no riot in the doing of it." So, in *Rex v. Rosewell (b)*, it is laid down

(a) 3 Bulstr. 196.

(b) 2 Salk. 459.

without qualification, that if a party build a house so near the land of another, that it become in any way a nuisance, the latter may enter upon the owner's soil and pull it down. In *Penruddock's case* (a), it was resolved, "that the dropping of water in the time of a feoffee is a new wrong, so that the permission of the wrong by the feoffor or his feoffee to continue to the prejudice of another, should be punished by the feoffee of the house to which &c.; and if it be not reformed after request made, the quod permittat lies against the feoffee, and he shall recover damages if he do not reform it, but without request made it doth not lie against the feoffee; but against him who did the wrong it lies without any request made, for the law doth not require any request to be made to him who doth the wrong himself." The plaintiff, in this case, who has permitted the filth to *accumulate* upon his land, comes within the description of a party who "does the wrong himself."

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Erle and Townsend, contra.—The plea is ill. It does not contain any averment that the nuisance originated with or was the direct act of the plaintiff; it does not state that any duty was cast upon him; nor does it shew this to be a case requiring a *festinum remedium*, as in the case of instant danger to life or health, in which perhaps the rule of law might be different. It ought, therefore, to have had an allegation of notice to the plaintiff, and that a reasonable time after such notice given had elapsed. The cases cited on the other side are all cases where the defendant was subjected to a positive deprivation of something previously enjoyed by him, but in such a case as this, a mere continuance of a nuisance of smell, a party has no right to enter upon the land of another to abate it, without notice given to remove it, and reasonable time allowed for that purpose. In *The Earl of Lonsdale v. Nelson*,

(a) 5 Rep. 101.

Exch. of Pleas, Lord *Tenterden* appears to recognize the distinction now contended for, when he says, "The defendants have not alleged that immediate repairs were necessary, nor that any

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person bound to repair had neglected to do so *after notice*." *Penruddock's case* is really in favour of the defendant, who stands, upon the allegations in this plea, in the situation of a feoffee or alienee of the locus in quo. In *Shalmer v. Pulteney (a)*, where it was held that a quod permittat lies against the owner of the land, his heir or feoffee, in respect of a nuisance levied by a stranger, a request was alleged in the declaration. The distinction between permissive and voluntary waste, which is recognized in *Martin v. Gilham (b)*, is analogous to that which obtains in the present case. The only case in which, according to the authorities, a notice or request is unnecessary, is that of trees overhanging a highway; the reason being, that any person may lawfully stand there to cut them.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—A rule was obtained in this case, by Mr. *Erle*, for judgment non obstante veredicto on the 4th plea found for the defendant, and argued a few days ago. This plea, to an action of trespass quare clausum fregit, stated, that the defendant, before and at the said time when &c., was possessed of a dwelling house, near the locus in quo, and dwelt therein; and that the plaintiff, before and at &c., *injuriously and wrongfully permitted and suffered* large quantities of dirt, filth, manure, compost, and refuse, to be, *remain*, and *accumulate* on the locus in quo, by reason whereof divers noxious, offensive, and unwholesome smells, &c. came from the close into the defendant's dwelling-house; and then the defendant justifies the trespass, by entering in order to abate the nuisance, and in so doing damaging the wall, and digging up the soil.

(a) 1 Ld. Raym. 276.

(b) 7 Ad. & E. 540; 2 N. & P. 568.

The question for us to decide is, whether this plea is bad after verdict; and we are of opinion that it is.

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The plea does not state in what the wrongful permission of the plaintiff consisted; whether he was a wrong-doer himself, by originally placing the noxious matter on his close, and afterwards permitting it to continue; or whether it was placed by another, and he omitted to remove it; or whether he was under an obligation, by prescriptive usage or otherwise, to cleanse the place where the nuisance was, and he omitted to discharge that obligation, whereby the nuisance was created. The proof of any of these three circumstances would have supported the plea; and if in none of the three cases a notice to remove the nuisance was necessary before an entry could take place, the plea is good; but, if notice was necessary in any one, the plea is bad, by reason of its neither containing an averment that such a notice was given, or shewing that the continuance was of such a description as not to require one.

It is clear, that if the plaintiff himself was the original wrong-doer, by placing the filth upon the locus in quo, it might be removed by the party injured, without any notice to the plaintiff; and so, possibly, if by his default in not performing some obligation incumbent on him, for that is his own wrong also; but if the nuisance was levied by another, and the defendant succeeded to the possession of the locus in quo afterwards, the authorities are in favour of the necessity of a notice being given to him to remove, before the party aggrieved can take the law into his own hands.

We do not rely on the decision in *The Earl of Lonsdale v. Nelson*, as establishing the necessity of notice in such a case, for there much more was claimed than a right to remove a nuisance, viz. a right to construct a work on the plaintiff's soil, which no authority warranted; but Lord *Wynford's* dictum is in favour of this objection, for he states that a notice is requisite in all cases of nuisance

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by omission, and the older authorities fully warrant that opinion, where the omission is the non-removal of a nuisance erected by another. *Penruddock's case* shews that an assize of quod permittat prosternere would not lie against the alienee of the party who levied it without notice. The judgment in that case was affirmed on error; and in the King's Bench, on the argument, the judges of that Court agreed that the nuisance might be abated, without suit, in the hands of the feoffee; that is, as it should seem, with notice; for in Jenkins's Sixth Century, case 57, (no doubt referring to *Penruddock's case*), the law is thus stated:—"A. builds a house, so that it hangs over the house of B., and is a nuisance to him. A. makes a feoffment of his house to C., and B. a feoffment of his house to D., and the nuisance continues. Now D. cannot abate the said nuisance, or have a quod permittat for it, *before he makes a request to C.* to abate it, for C. is a stranger to the wrong: it would be otherwise if A. continued his estate, for he did the wrong. If nuisances are increased after several feoffments, these increases are new nuisances, and may be abated without request."

We think that a notice or request is necessary, upon these authorities, in the case of a nuisance continued by an alienee; and therefore the plea is bad, as it does not state that such a notice was given or request made, nor that the plaintiff was himself the wrong-doer, by having levied the nuisance, or neglected to perform some obligation, by the breach of which it was created.

Lord ABINGER, C. B., observed, that it might be necessary in some cases, where there was such immediate danger to life or health as to render it unsafe to wait, to remove without notice; but then it should be so pleaded; in which the rest of the Court concurred.

Rule absolute.

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VACATION SITTINGS AFTER HILARY TERM.

LLEWELLYN *v.* The EARL of JERSEY and Another.

Feb. 6.

TRESPASS for breaking and entering the plaintiff's close, and cutting down trees therein. Pleas, first, not guilty; secondly, that the close in which &c., was not the close of the plaintiff: thirdly, that it was the close, soil, and freehold of the Earl of Jersey. Issues thereon.

At the trial before *Rolfe*, B., at the last Glamorganshire Assizes, it appeared that the close in question consisted of a long narrow strip of land, containing upwards of an acre, bounded on the north-east by the high road from Neath to Cardiff, and on the west and south-west by the sea-shore; and abutting at its south-eastern extremity upon a garden in the occupation of a Mrs. Thomas. The whole of this strip of land had originally belonged to the Earl of Jersey, who, in the year 1821, contracted with one Lewis Thomas for the sale to him (*inter alia*) of a part of it; and by lease and release, dated in the year 1833, the premises so contracted to be sold were conveyed to a person under whom the plaintiff claimed, by the following description:—"All and every the messuages or tenements, lands, hereditaments, and premises, the particulars whereof respectively are set forth in the three schedules respectively annexed to this indenture." The

A deed conveyed a piece of land, forming part of a close, by reference to a schedule annexed. The schedule described the land, in a column headed "No. on the plan of the Briton Ferry Estate," as "153 b;" in a second column, headed "Description of premises," as "a small piece marked on the plan;" in a third column, as being in the occupation of J. E.; and in a fourth, as "34 perches." At the time of the contract, a line was drawn upon the plan as the boundary line dividing the piece 153 b from the rest of the close of which it formed a part.

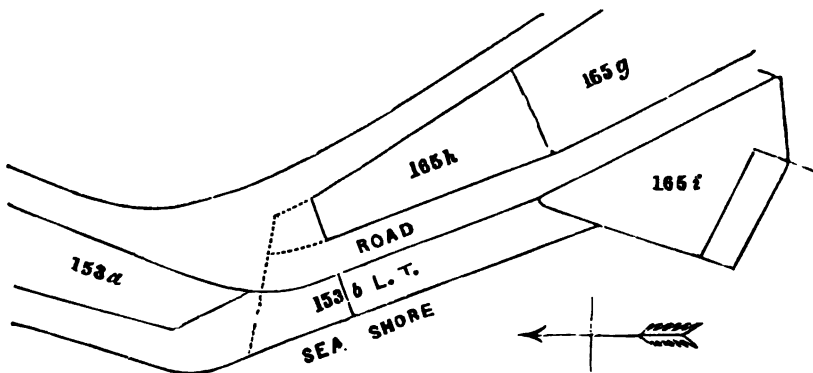
The plan was drawn to a scale, but, upon measurement of the land, was found incorrect; and 153 b contained, within the line so drawn, less than 34 perches according to the actual measurement on the plan, and 27 perches only according to the actual measurement of the land:—*Held*, that the statement that the piece of land conveyed contained 34 perches, was merely *falsa demonstratio*, the prior portion of the description being sufficient to convey it, and that the deed passed only the portion of land actually marked off on the plan, as measured by the scale.

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<i>No. on the Plan of the Briton Ferry Estate.</i>	<i>Description of Premises.</i>	<i>In whose Occu- pation.</i>	—
165 g.	Tyr-y-Twr House, now called Bigland Lodge.	The said John El- rington.	A. R. P. 1 0 30
165 h.	Pleasure-gardens, &c.	Ditto.	0 1 4
165 i.	Dwelling-house and offices.	Catherine Thomas, under a lease from the late Lord Vernon.	0 1 5
153 b.	A small piece marked in the plan.	The said John El- rington.	0 0 34

In the plan of the Briton Ferry estate, referred to in the schedule, the property was delineated as follows; the line on 153 b being drawn roughly with a pen, and the letters L T (the initials of Lewis Thomas) also written with a pen :—



In this plan, it appeared, the boundary of 165 h had been erroneously laid down, it being in fact a chain longer, in the direction of the dotted line on the above sketch (which was not in the map). It appeared also that the piece 153 b, as marked upon the plan, contained 27 perches only by actual measurement; and that the measurement

of it according to the plan (which was drawn to a scale), though it made it wider and larger than the real extent, even then did not make it amount to 34 perches. The plaintiff relied, in order to maintain his action, upon a trespass by the cutting down of a tree, which the jury found not to be within the boundary line drawn on the plan, nor within the portion of land conveyed, if 34 perches were to be included, computed according to the measurement on the plan; but which would fall within it, if the line were to be advanced upon the land parallel to that drawn with ink on the plan, so as to include 34 actual perches, or if the line were to be either a continuation of the [dotted] line at the termination of the real boundary of 165 h, or a line drawn parallel thereto, and containing 34 perches, according to the measurement on the plan, or the actual measurement. The plaintiff contended, that the boundary of 153 b having been drawn under the mistake arising from the erroneous boundary line of 165 h, its proper boundary would be either the continuation of the dotted line (which would give him much more than 34 perches), or a line drawn parallel thereto, so as to contain 34 actual perches. The learned Judge was of opinion that the plaintiff was entitled to 34 perches, to be included in a line drawn parallel to the boundary line upon the plan, according to the measurement on the plan; and under his direction the jury found a verdict for the defendants, leave being reserved to the plaintiff to move to enter a verdict for him on the second and third issues.

In Michaelmas Term, *Chilton* obtained a rule accordingly, against which

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E. V. Williams and *W. M. James* now shewed cause.—The contest between these parties is this. Lord Jersey says, that nothing passed by his conveyance but what is included within a line drawn upon the land as the boundary line of 153 b is drawn upon the plan. The plaintiff says, as the

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object manifestly was to give the purchaser a frontage to the sea for the whole of the piece 165 h, and as the boundary of that piece is erroneously laid down upon the plan, he has a right to have the boundary line of 153 b drawn in extension of the real boundary of 165 h. Now it is clear, that the part of the plan to which the schedule refers is by such reference to be considered as incorporated in the deed: it is the same thing as if it had been actually drawn upon the deed. When these parties contracted, there was no boundary, natural or artificial, to the west, dividing the piece 153 b from the rest of the property: it became necessary, therefore, that they should create a boundary; this they did by drawing a line with ink upon the map, which being drawn to a scale, the quantity which passes by the conveyance is at once ascertained by the application of that scale to the map. The deed must be considered as expressing that which the map expresses, just as if it had been defined in express words, by distance and by the angle, in the parcels of the deed: in that case the parties could not have varied therefrom either as to the distance or the angle; and the same rule applies, when they express it by symbols, which are by reference incorporated in the deed. Neither of the parties can afterwards claim what they would have bargained for if the map had been correct. It is probable that neither of the parties ever saw the spot, and that the map, with reference to which they create a boundary, was all they had before them. The primary description is that which is marked upon the plan; and the error in the number of perches is immaterial, and falls within the rule that *falsa demonstratio non nocet*. [*Parke, B.*—The plaintiff says the principal subject of bargain is the 34 perches, and that, looking at the plan, he does not get that, therefore *the plan* is the *falsa demonstratio*.] The answer is, that the parties bargained on the footing of the plan, both supposing it to be correct; they bargained for a certain quantity, with certain boundaries, which they

proceeded to define by reference to the plan : whereas now the plaintiff says the plan is incorrect in the delineation of an adjoining close, and so claims a much larger quantity, not falling within that description, and which he admits he *did not* bargain for, but which he *would have* bargained for had the plan been correct. It is true, the piece of land within the lines drawn on the plan contains 27 perches only ; but the parties having the plan before them, and agreeing so to define the boundary, it must be taken that they *assumed* the quantity within those lines to be 34 perches : and the agreed boundary cannot afterwards be varied because the quantity turns out in fact to be less, and that assumption proves to have been erroneous. [*Parke, B.*—You say the description of the piece in the schedule, by reference to the plan, is sufficient, and then constat de identitate, and the error as to the number of perches is merely falsa demonstratio.] Yes. It is like the case put in Sheppard's Touchstone, 248 :—" If one grant in this manner all my meadow in D., containing ten acres, whereas in truth his meadow there doth contain twenty acres, it seems this is a good grant for the whole twenty acres." [*Rolfe, B.*—If it had been called twenty-seven perches, but really contained thirty-four, could Lord Jersey have said the purchaser should not take the whole?]*—*They were then stopped by the Court.

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Chilton and Nicholl Carne, in support of the rule.—It was evidently intended that the boundary line of 153 b should be a prolongation of the boundary of 165 h, and so accordingly the line was drawn upon the plan. But then, when the plan comes to be applied to the land, the boundary of 165 h being inaccurately laid down, and being therefore advanced, that of 153 b must also be advanced in continuation of it. [*Alderson, B.*—I do not see how the mistake in the boundary of 165 h affects the case ; there is no reference to that close in the description of 153 b in the schedule.]

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At all events, the plaintiff is clearly entitled to 34 perches of land; and the question is whether, in construing the plan, he is to have only what a surveyor would lay out upon the plan with rule and compasses, or is not rather entitled to what a person of common understanding would say was included in such a contract. The first rule in the construction of deeds is, that "the construction be favourable, and as near the words and apparent intents of the parties, as the rules of law will permit, for the maxims of law are, that *verba intentioni debent inservire, et benigne interpretamur chartas propter simplicitatem laicorum*. And therefore the construction must be reasonable, and according to common understanding" (a). Now a layman, looking at this description, would at once say that he was to have by the contract 34 perches of land; that is the substantial and important part of the description. The bargain was not made with reference to the plan, but to the real state of things; but by the plan the parties are misled into the false description. They might not be aware that the plan was drawn to a scale. There being an ambiguity in the description, the language of the deed must be taken most strongly against the grantor.

PARKE, B.—It seems to me, that when the facts of this case are fully understood, there can be no reasonable doubt upon it: the simple question being, what passed by the deed of 1833. That deed recites a contract for the sale of certain lands, by a description corresponding with that subsequently contained in the deed, and then proceeds to convey them, with a reference for that description to three schedules. The portion of the particular schedule (the third) which relates to the piece in question, states it, in the first column, which is headed "No. on the plan of the Briton Ferry Estate," to be "153 b;" in the second

(a) 2 Bla. Comm. 379.

column, under the heading "Description of premises," it is stated to be "a small piece marked on the plan;" in the third, it is described as being in the possession of John Elrington; and in the fourth, as containing 34 perches. Now it appears to me that this case may be determined by the application of two well-known maxims of law. The first is, that "*verba illata inesse videntur*;" according to which, we must consider it to be the same thing here, as if the map or plan, which is there referred to, had been actually inserted in the deed. But the words "34 perches," having no relation to the plan, must be taken to mean 34 perches by admeasurement. Then the other rule of law applies, that as soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it; according to the maxim "*falsa demonstratio non nocet*." Is there then that convenient certainty in this case? As to the plan no question is made, and the black line is admitted to have been put upon it with the intention of pointing out what was contracted for: the plan also appears, on the face of it, to be drawn to a scale, and it is incorporated, on the principle already mentioned, with the deed. Three of the boundaries were already fixed, and nothing remained to be fixed but the boundary to the west, which may be fixed immediately by drawing a line upon the land, corresponding, according to the scale, with that drawn upon the plan. Thus the portion conveyed is perfectly described, and can be precisely ascertained, and no difficulty arises except from the subsequent statement, that it contains 34 perches. That, however, becomes merely a false description of that which is conveyed with convenient certainty before; and resembles the case in Sheppard's Touchstone, of the meadow in D., described as containing ten, when in fact it contained twenty acres. It is a mere *falsa demonstratio*, and does not affect that which is already sufficiently con-

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Each of Pleas, veyed. By the application, therefore, of the legal maxims
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 I have mentioned, this case is readily determined: and it
 is of much more importance that we should adhere strictly
 to legal maxims, than attempt to evade them in order to
 meet the supposed intention of the parties. If they really
 intended in this case to make the boundaries of the two
 closes correspond, they should have taken care to use proper
 words for that purpose, which they have not done. Sitting
 here, we can only say that the portion separated by the line
 upon the plan, and that alone, passed by the description
 they have employed. The verdict, therefore, ought not to
 be disturbed.

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ALDERSON, B.—I am of the same opinion. It is quite clear that, applying the true principles of law to the construction of this deed, we must be governed by the description contained in it, and cannot travel out of it to consider what the parties may have intended. It appears to me that the statement as to the 34 perches is merely *falsa demonstratio*; and it is one which applies as well to the defendant's as to the plaintiff's case. Looking at the description, it is clear that what was conveyed was the small parcel 153 b, as defined upon the plan produced at the trial.

GURNEY, B., concurred.

ROLFE, B.—There was an alternative view presented to the jury, either of which gave the defendants the verdict. I rather suggested the second as being the correct view, but I am now satisfied that the first was the proper one, namely, that the plaintiff was entitled only to the portion actually marked off upon the plan.

Rule discharged.

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SPENCE v. ROGERS.

Feb. 11.

TRESPASS for breaking and entering the dwelling-house and garden of the plaintiff, and making a great noise and disturbance therein, and staying and continuing therein, making such noise and disturbance, for a long space of time, to wit, ten days, and forcing and breaking open and damaging the doors, locks, staples, and hinges of the dwelling-house, and by walking destroying the herbage, and tearing up, breaking up, breaking down, and damaging the fruit trees and fruit, shrubs, and plants, and seizing and taking away certain furniture and chattels of the plaintiff, and exposing them for sale, and selling them upon the premises of the plaintiff without his license or authority; whereby and by means of which several premises the plaintiff and his family were greatly harassed, disturbed, and annoyed in the peaceable possession of the said dwelling-house and garden; and the plaintiff was prevented from carrying on and transacting his lawful business, and was deprived of the use and enjoyment of his said goods and chattels.

Plea, actionem ulterius non, because after the trespass, and after the commencement of this action, the plaintiff had become bankrupt, and one W. Pennell had been appointed his assignee, who then accepted the said appointment; by virtue of which appointment and acceptance, and by force of the statutes, the said causes of action and every of them became absolutely vested in and transferred to the said W. Pennell.

To this plea the plaintiff demurred generally, stating, as the point for argument, that the declaration disclosed a variety of causes of action which did not, according to law, pass to or vest in the plaintiff's assignees.

Joinder in demurrer.

Trespass for breaking and entering the dwelling-house and garden of the plaintiff, and making a great noise and disturbance therein, &c. &c., whereby the plaintiff and his family were greatly harassed, disturbed, and annoyed in the peaceable possession of the dwelling-house, &c.

Plea, that, after the trespass and after the commencement of the suit, the plaintiff had become bankrupt, and one W. P. was appointed assignee, whereby and by virtue of the statutes &c. the said causes of action vested in the said W. P.: —*Held*, on general demurrer, that the plea was bad.

Quære, whether it would have been good if it had been shewn that the locus in quo passed to the assignee.

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Peacock, in support of the demurrer, was stopped by the Court, who asked *Manning*, Serjt., who appeared to support the plea, whether he could distinguish the case from that of *Clark v. Calvert* (a).

Manning, Serjt.—This case is distinguishable from *Clark v. Calvert*, because it has arisen since the passing of the 6 Geo. 4, c. 16, and must be decided with respect to the 63rd & 64th sections of that act, the first relating to personal and the other to real property. It has been decided, with respect to the 64th section, that it operates to pass all the bankrupt's real property, and all rights in respect of it belonging to the bankrupt. Thus, in *Michell v. Hughes* (b), it was held that a right of entry, vested in husband and wife in right of the wife, passed to the assignees of the husband. *Smith v. Coffin* (c) shews that every thing that belongs to the bankrupt passes to his assignees. In *Michell v. Hughes*, Tindal, C. J., after referring to *Smith v. Coffin*, says, "As that case has established that such right of entry was an hereditament within the meaning of the bankrupt act, and that it passed to the assignees under the general words inserted in the bargain and sale, we think the same construction must be put on the present bankrupt act, notwithstanding some words omitted in the 64th section which are to be found in the previous acts; for we think neither the extent nor the nature of the bankrupt's property, intended to be vested in the assignees for the benefit of the creditors, is thereby in any way limited or confined." This was a trespass committed upon property of which the bankrupt was possessed before his bankruptcy, and which passed to the assignees, and the assignees are entitled to damages for any deterioration it may have sustained. [Parke, B.—Are there not matters included in this declaration for which the assignees would

(a) 8 Taunt. 742; 3 Moore, 96. (b) 6 Bing. 689; 4 M. & P. 577.

(c) 2 H. Bl. 444.

not be entitled to recover?] No; the personal injury is *prima facie* only matter of aggravation. Any plea, therefore, which justifies the entry will be an answer to the personal injury, unless the plaintiff, by a new assignment, gives notice to the defendant that he means to insist upon it as a substantive cause of action: *Taylor v. Cole (a)*. No injury of a personal nature is alleged as forming part of the gist of this action. The action is for breaking and entering the plaintiff's dwelling-house, garden, and premises, and making a great noise and disturbance therein, &c., and the allegation that the plaintiff and his family were disturbed and annoyed thereby is only under the *per quod*, and is mere matter of aggravation, which could not be pleaded to. The whole of the substantial grievance alleged as the ground of the action might have taken place, consistently with the declaration, in the absence of the plaintiff. The right to recover for the personal injury is consequent upon the injury to the real property, and the right to recover damages for that would pass to the assignees. [*Parke, B.*—The plea does not state that the assignees have made their election to sue.] No election is necessary: the right vests in the assignees at once, as in any other case. Suppose the defendant had pulled down the plaintiff's house, could it be contended that the right of action in such case did not pass to the assignees? Clearly not. In *Wright v. Fairfield (b)*, it was held that assignees under a bankruptcy, since the stat. 6 Geo. 4, c. 16, might maintain an action for unliquidated damages which accrued before the bankruptcy by non-performance of a contract. [*Parke, B.*—Because that was part of the personal estate. It was a contract relating to personal property, and the action was for a wrongful act which prevented a profit from coming to the assignees. If the personal property passes, the contract also will pass. The

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(a) 3 T. R. 292; 1 H. Bl. 555.

(b) 2 B. & Ad. 727.

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injury here complained of does not at all affect the value of the real property. Under this plea you might give evidence of a trespass committed ten years ago, and your argument must go to the extent that the assignees can support this action of trespass for an entry which may have been committed ten years before their appointment. *Clark v. Calvert* appears to me to decide that the assignees cannot maintain such an action. The Court there perhaps unnecessarily go into the question as to the right of the assignees to interfere.] In that case, the bankruptcy and assignment were pleaded, and therefore it would depend upon the words of the assignment whether the right of action passed. Here every thing of which the bankrupt was possessed is assigned, because the effect of the statute is to vest every right of which he was possessed in the assignees. [*Parke, B.*—Have you any authority to shew that assignees can maintain an action of trespass *quare clausum fregit* for a trespass not committed in their own time? *Smith v. Mills (a)* seems to shew the contrary. It is there said that, to entitle a man to bring trespass, he must, at the time when the act was done which constitutes the trespass, either have the actual possession in him of the thing which is the object of the trespass, or else he must have a constructive possession in respect of the right being actually vested in him.] The Court is there speaking of the party in whom the right to bring an action of trespass was originally vested: how far the right so vested would be transmissible to other persons was not the subject of inquiry. *Brandon v. Sands (b)*. [*Parke, B.*—How are the assignees to recover for this trespass, committed, it may be, many years before the bankruptcy?] By shewing that a right of action accrued to the bankrupt—that he became bankrupt—and that his rights of action vested in the plaintiffs as his assignees. If the bankrupt acts are so framed

(a) 1 T. R. 475.

(b) 2 Ves. jun. 565.

as not to extend to such a case, the greatest injustice may be done. It may be that the whole of the deficiency of the bankrupt's estate may have been caused by acts of trespass *quare clausum fregit*. One of the learned barons (a) is well aware that, shortly before the passing of the Reform Act, the electors at Camelford being nearly balanced, a tenant of the Marquis of Hertford built three houses, which would have given his party three votes. At nine in the morning, the occupiers received notice from the agent of the Earl of Darlington that the houses had been undermined, and would at the end of an hour be blown into the air. The parties removed their goods, the explosion took place at the appointed time, and a majority was secured at the ensuing election. If the builder of these houses had become bankrupt, and the persons who furnished the bricks and timber for the buildings had been appointed his assignees, are the bankrupt laws so imperfect as to deny to the creditors all redress? Can it be doubted that an action of trespass would lie at the suit of assignees, to recover the mesne profits of the bankrupt's lands accruing before his bankruptcy? [Parke, B.—The old bankrupt law and the new are the same in this respect.] The right of the assignees may be the same, but the mode of pleading is different, in consequence of the assignment of the bankrupt's property from the commissioner to the assignees being dispensed with. Not only does the right to bring a real action to recover the bankrupt's freeholds pass to his assignees, but they may recover damages for the injury which he sustained from being held out of those freeholds. The language of the Court in *Clark v. Calvert* must be understood in a qualified sense, and with reference to the state of the pleadings in that case. Under the old bankrupt law title might be shewn in the assignees in two ways. It might be pleaded that the commissioner assigned all the estate of the bankrupt, and (supposing

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that to be necessary) that the assignees elected to take the particular property as part of that estate, or, pleading according to the legal effect of such general assignment and particular acceptance, it might have been alleged that the commissioner assigned the particular property to the assignees. In *Clark v. Calvert*, the defendant did neither. He stated the general assignment, and there he stopped, which enabled the Court to say that the assignees had not interposed, without going into the question whether the allegation of interposition or of non-interposition would properly come from the defendant as part of his plea, or from the plaintiffs by way of replication. Here the pleading raises no such difficulties. *Brandon v. Pate* (a) shews that assignees have far more extensive rights than other representatives, and that they can recover for any act which has diminished the bankrupt's estate; and the act here charged against the defendant had that effect. There it was held that the assignees of a bankrupt might recover from the winner money lost at play by the bankrupt before his bankruptcy. And *Heath, J.*, says, "An executor clearly could not bring the action, which by the statute is limited to the loser himself, within the three months; but the assignees of a bankrupt are different from other representatives, for if the party himself were to recover the debt, he must pay it over to the assignees. It is to be considered as part of the bankrupt's estate, which has wrongfully passed to the winner; and if so, the assignees have a right to it, and ought in reason to sue for it." Although the executor does not represent the person of the testator, so as to take rights of action which belong to him personally, that does not apply to the case of assignees. It would be absurd to say that it should be at the option of the bankrupt to bring an action, and that the assignees might afterwards recover the damages from him.

(a) 2 H. Bl. 308.

PARKE, B.—I am of opinion that the plea is bad. In order to be a valid defence, it must be good in omnibus. There is a *prima facie* title in the plaintiff, and the plea ought to shew that it has been taken out of him. The defendant does not shew that this land ever passed to the assignees. The injury to the land was long before the bankruptcy, and the plaintiff may have sold it after the trespass and before the bankruptcy. This is precisely the same as *Clark v. Calvert*, with only this difference, that there the assignment was pleaded instead of the appointment of the assignee, which has now the same effect.

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ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

STAVART v. EASTWOOD.

Feb. 11.

ASSUMPSIT.—The declaration stated, that the plaintiff being possessed of a bill of exchange, drawn by one Samuel Eastwood upon and accepted by J. Shaw, payable to S. Eastwood's order, for £400, and by him indorsed to one G. Elder, and by G. Elder indorsed in blank, and a fiat in bankruptcy having issued against S. Eastwood, by a certain agreement made between the plaintiff and the defendant, the defendant bought of the plaintiff, and the plaintiff bargained and sold to the defendant, the said bill of exchange for the sum of £200; and by the said agreement it

Assumpsit.—The declaration alleged, that the plaintiff being possessed of a bill of exchange drawn by one S. E. upon and accepted by J. S., payable to S. E.'s order, for £400, and by him indorsed to G. E., who indorsed it in blank, and a fiat in bankruptcy having

issued against S. E., by a certain agreement between the plaintiff and defendant, the defendant bought of the plaintiff, and the plaintiff bargained and sold to the defendant, the said bill of exchange for £200, and it was agreed between the plaintiff and defendant that, upon G. E. handing over to the plaintiff the sum of £200, the said bill should be delivered over to him. The declaration then alleged mutual promises, and the plaintiff's readiness to perform the agreement, and deliver the bill to the defendant or G. E., and averred that although the defendant did pay £50, parcel of the £200, yet he had not, although often requested, paid the residue thereof:—*Held*, that the declaration was bad on general demurrer, for not averring that a reasonable time had elapsed since the making of the agreement.

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was agreed between the plaintiff and the defendant, that upon one George Elder handing over to the plaintiff the said sum of £200, the said bill of exchange should be delivered over to the said G. Elder; and the defendant thereby further agreed, that if the estate of the said S. Eastwood paid more than 10s. in the pound under the said fiat, he the defendant would pay to the plaintiff all that the estate realized more than 10s. in the pound, upon the amount of the said bill of exchange. That thereupon, in consideration of the said agreement, and that the plaintiff then, at the request of the defendant, promised the defendant to perform the said agreement in all things on his part to be performed, the defendant then promised the plaintiff to perform the same in all things on his the defendant's part to be performed; and although the plaintiff had always from the making of the said agreement been ready and willing to perform the same in all things on his part, and to deliver the said bill of exchange to the defendant or the said G. Elder, upon payment to him, the plaintiff, of the said sum of £200, according to the said agreement; and although the defendant, after the making of the agreement, to wit, on the 10th October, 1841, did pay to the plaintiff, in part performance of the said agreement on his part, the sum of £50, parcel of the said sum of £200, yet the defendant, disregarding his promise, had not, although often requested so to do, paid to the plaintiff the residue of the said sum of £200, or any part thereof, but had neglected and still neglected and refused so to do, nor had the said G. Elder paid the plaintiff the residue, or any part thereof, or any part of the said sum of £200, and the said sum of £150 still remained wholly due and unpaid to the plaintiff.

There was a plea to this count, which was demurred to, and which was held to be clearly bad, but the case is thought not worth reporting on that point. The defendant joined in demurrer, and in the points marked for argu-

ment, stated that he intended also to rely on the insufficiency of the declaration, inasmuch as it did not allege a promise to pay on request, or any promise to pay the sum of £200, the non-payment of which on request was the breach alleged, nor was any such promise necessarily to be inferred from the agreement: that the only promise that could be inferred was a promise to pay on demand, or within a reasonable time.

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Cowling having been heard in support of the demurrer to the plea, and *Addison* in support of it, and the Court being clearly of opinion that the plea could not be supported,

Addison then objected to the declaration.—By the terms of the agreement, as alleged in the declaration, the payment of the money and the delivery of the bill were to be concurrent acts; and the plaintiff, in order to maintain the action, ought to have shewn that he tendered the bill, or that the defendant waived the tender. Now, it cannot be said that the payment of the £50 was any waiver of the tender. The declaration ought to have averred that a reasonable time had elapsed for the payment of the money, and that the plaintiff had offered to deliver the bill. *Morton v. Lamb* (a) is in point. That was an action for the non-delivery of corn at a specified place pursuant to an agreement, whereby the defendant, in consideration that the plaintiff had bought of him a certain quantity of corn at a fixed price, undertook to deliver it to the plaintiff at that place, within one month from the time of the sale; and the Court held that the plaintiff must aver a tender of the price, or something equivalent thereto, for the delivery of the corn and the payment of the price were concurrent acts, to be done at the same time; and that each must

(a) 7 T. R. 125.

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aver performance, or an offer to perform his part, before he could maintain an action against the other. That was an objection taken after verdict, and was held to be matter of substance. The defendant here was not bound to pay until the bill was delivered or tendered. The payment of the £50 in part by the defendant was no waiver of the tender; for if the defendant did more than he was bound to do, that did not discharge the plaintiff from performing his part of the contract. The allegation that the plaintiff had always been ready and willing to perform the contract and deliver the bill, cannot supply the place of the averment of an offer to deliver it, especially as it is not stated that the defendant had any notice thereof. The declaration does not shew that the time for the performance of the defendant's duty had arisen. A contract to deliver or accept goods, without specifying any time, amounts to a contract to deliver them within a reasonable time, and it is not averred here that a reasonable time had elapsed.

Cowling, contra.—The declaration is good at all events after pleading over, for it discloses a sufficient cause of action. It is in effect a claim for goods bargained and sold; only the facts are set out in a more extended way than in the form usually adopted. Then it avers mutual promises, from which it may be inferred that payment is to be made upon request. It is never usual, in an action for goods bargained and sold, to aver that a reasonable time has elapsed; the property in the goods passes by the bargain. If there be a contract for a specific chattel, the reasonable time is the moment the contract is completed. Suppose it were a contract for a horse, the property in it would pass by delivery, and there would be no necessity to make any distinct request: the one party has a right to the horse and the other to the price from the time of the bargain. So here, this, being a specific chattel, passed to the defendant. In

Bach v. Owen (a), it was held that if A. and B. agree to exchange horses, and B. gives a sum of money to bind the bargain, A. may maintain an action against B. for not delivering his horse, without alleging any delivery of or offer to deliver his own to B., for that the payment of the earnest money vested the property of the plaintiff's horse in B. There *Buller, J.*, says, "The payment of the halfpenny vested the property of the colt in the defendant, and therefore it was unnecessary for the plaintiff to shew that he had tendered the colt to the defendant." Now here there was a distinct sale of the bill for £200, and there was also a part payment of the price, namely of £50, and the property in the bill therefore vested in the defendant.

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PARKE, B.—In this case the property could not pass. A bill of exchange is a peculiar chattel, and only passes by indorsement, or by delivery of it when it is payable to bearer. The difficulty is, that the time for the performance of the contract is not shewn to have elapsed. The plaintiff does not shew that the time has arrived when the money was to be paid by Elder. Something more is to be done, because Elder is to bring the money. The agreement is, that the defendant is to send the money by Elder to take up the bill; at least he is to have the option of sending the money by Elder; and he must have a reasonable time to do it in. We cannot tell whether a reasonable time had elapsed or not. I think you had better amend.

Leave was then given to amend, by averring that a reasonable time had elapsed; otherwise

Judgment for the defendant.

(a) 5 T. R. 409.

Mem. of Cases,
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Feb. 8.

Where a wife carried on in her husband's absence the business of a shop, and by his authority attended to all the receipts and payments:—
Held, in an action of replevin by the husband, that a statement made by the wife to the landlord, on the occasion of her paying him rent for another person, that she would pay the rent of the shop on a future day, and admitting its amount, was not evidence against the husband of the terms of the tenancy.

MEREDITH v. FOOTNER.

REPLEVIN.—Avowry for rent in arrear upon a demise by the defendant to the plaintiff of a house and premises, at the rent of £6 a year, payable on the 10th of May. Plea in bar, non tenuit, upon which issue was joined.

At the trial before *Wightman, J.*, at the last assizes at Winchester, it appeared that the house in question was occupied by the plaintiff's wife, who carried on in it the business of a grocer's shop. The plaintiff was coachman to the Earl of Egremont, and resided at a considerable distance, but occasionally visited his wife; and it was admitted at the trial, that she carried on the business of the shop by her husband's authority, and attended to all the receipts and payments. In order to prove the tenancy as alleged in the avowry, a witness was called for the defendant, who stated, that the plaintiff's wife, having called upon the person by a devise from whom the defendant claimed the premises, to pay a neighbour's rent, said "that she would pay her own rent on the 10th of May, when it would be due, if it was remitted to her by her husband in time: that he generally sent it her within a few days of the time, and the amount was £6." This evidence was objected to on the part of the plaintiff, on the ground that the wife was not the agent of the husband to make such a statement. The learned Judge, however, admitted it: and a verdict having been found for the defendant,

Erle, in Michaelmas Term, obtained a rule nisi for a new trial, on the ground that the evidence was improperly admitted; against which

Fitzherbert now shewed cause.—The objection which might have existed to the reception in evidence of this

statement of the wife, was completely removed by the admission made on the trial, that she was occupying and carrying on business in the house in question, as the agent of her husband. Any arrangement with respect to the payment of the rent would naturally fall within the scope of such her authority. *Clifford v. Burton* (a) is expressly in point. There the wife served in her husband's shop, and carried on the business of it in his absence; and it was held, that admissions, made by her on application for payment of goods previously delivered at the shop, were receivable in evidence against the husband. In truth the plaintiff, by replevying, admits her agency for the purpose of the occupation of the house.

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Erle and Barstow, contra.—There was no proof of any payment of rent upon any occasion by the wife, nor any evidence of an actual demise; and the admission that she made all payments for her husband extended only to payments made in the course of the shop business, and at all events would not render any statement of hers at a time when a payment was not made, receivable in evidence. If a party trusts another to manage his affairs, and in the course of that employment to make payments for him, that does not make the other his agent to make an admission. [*Parke, B.*—No: admissions of agents do not in general bind the principal, unless it be in the course of their agency to make admissions; as in the case of bankers giving receipts: *Fairlie v. Hastings* (b).] The case of *Clifford v. Burton* is no authority for the defendant, because there the admission extended only to the subject of the retail business, which was within the wife's express agency. It may be doubted, moreover, whether that case would now be sustained; for it is observed in *Phillips on Evidence*, vol. 1, p. 385, (9th edit.), that the early authori-

(a) 1 Bing. 199; 8 Moore, 16.

(b) 10 Ves. 123.

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ties on this subject have gone too far. The mere fact of a wife's being authorized to occupy the shop, cannot raise an inference that she had authority to take it at a certain rent.

PARKE, B.—This rule must be made absolute. The admission made by Mr. *Erle* at the trial constitutes the wife the agent for her husband in receiving or paying money in respect of the shop, but it does not extend farther. Therefore, if the question were whether the receipt of shop goods bound the husband, her admission would be evidence for that purpose. This, however, was either an admission of an antecedent contract for the hire of the shop, or of a contract to take it from that time, viz. the 10th of May 1840, at the rent of £6 a year. Now though the wife might be the agent of her husband to make payments, she is not necessarily his agent to make admissions of an antecedent contract; and therefore, if the admissibility of this statement be rested on the ground of its being evidence of an antecedent lease, it must fail. Then although, when coupled with her subsequent possession, it might be evidence to shew a contract for taking the shop *in futuro*, the admission at the trial does not make her an agent to take a lease for the benefit of her husband; and on that ground also the evidence was inadmissible. The admission does not go far enough to let in the evidence, either on the one ground or the other.

ALDERSON, B.—This was not an admission accompanying an act done, nor an act which itself the wife was authorized to do. A wife cannot bind her husband by admissions, unless they fall within the scope of the authority which she may reasonably be presumed to have derived from him; and where she is carrying on such a trade as this, if it be necessary for that purpose that she should have such a power, she may be his agent to make admis-

sions with respect to matters connected with the trade. But here every thing was consistent with the fact of the husband's having originally hired the shop on what terms he pleased, and it could not be necessary for the purpose of carrying on the business of the shop, that she should make admissions of an antecedent contract for the hire of the shop, or that she should make a new contract for the occupation of it for the future. The statement in question, therefore, was not of such a nature as she was authorized to make, and as it was the only evidence of the tenancy, there must be a new trial.

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GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

MICHELL v. WILLIAMS.

Feb. 8 & 9.

CASE, for maliciously and without probable cause charging the plaintiff with unlawfully and maliciously breaking down the dam of a fish pond of the defendant, with intent to take the fish therein. Plea, not guilty.

Case for a malicious prosecution.—The plaintiff, having become tenant to the defendant, who resided in Wiltshire, of a house and lands in Carmarthen-shire, together

At the trial before *Wightman, J.*, at the last Bristol assizes, it appeared that the plaintiff became, in June 1841,

with the exclusive right of sporting over certain lands adjacent, belonging to the defendant, fished one of the ponds by cutting down the dam, and but few fish having been caught, one D., who was the defendant's local agent, suggested to the plaintiff that he might fish a certain pond on the estate by cutting down the bank and placing a net to catch the fish; which the plaintiff accordingly afterwards did during the tenancy, and a few fish were taken. Disputes having afterwards arisen between the plaintiff and the defendant, D. laid an information before magistrates against the plaintiff for unlawfully and maliciously breaking down the dam and destroying the fish, under 7 & 8 Geo. 4, c. 30, s. 15, and D. having been examined, the magistrates required the plaintiff to find bail to appear to an indictment for that offence at the next assizes, where a bill was preferred but ignored. The defendant was not present at the hearing of the information, nor was there any evidence to shew that he knew that D. had given the plaintiff permission. At the trial, the Judge asked the jury whether in their opinion D. had given permission, and they found that he had; they also found that D. acted under the defendant's authority in instituting the proceedings; and the learned Judge having expressed his opinion that there was an absence of reasonable and probable cause:—*Held*, that he was correct in so deciding, and that, independently of the permission given by D., there was no reasonable or probable cause for instituting the proceedings.

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the yearly tenant to the defendant, a clergyman residing at Marlborough, of a house and lands in Carmarthenshire, together with the exclusive right of sporting over certain lands adjacent to the house, belonging to the defendant. A person named Durance, resident in the neighbourhood, was the defendant's local agent for the management of his lands; and in the summer of 1841 the defendant, in the presence and with the assistance of Durance, fished a pond near the house by cutting down the bank, which was stated by some of the plaintiff's witnesses to be the usual mode of fishing a muddy pool. Few fish having been caught, Durance said, if the plaintiff would go to a pond on the defendant's lands, at a spot called Mount Pleasant, he would have some good sport there, for he had put some fish in it about two years before, and unless he got them soon, the cranes would take them. Shortly afterwards, Durance asked the plaintiff's gamekeeper why his master did not fish the pond, and pointed out to him how it should be done, by cutting the bank and putting a net to catch the fish. On the afternoon of the 25th of April, 1842, the plaintiff cut the dam of this pond, and carried away from it fish which weighed about two pounds. On the 9th of June following, (disputes having in the interval arisen between the plaintiff and the defendant) an information under the statute 7 & 8 Geo. 4, c. 80, s. 15, for unlawfully and maliciously breaking down and destroying the dam of this fish pond, with intent to take the fish, was laid before the magistrates of the district by Durance, as the agent of the defendant, against the plaintiff. The hearing of the information was postponed till the 16th, when the agreement under which the plaintiff had taken the house being produced, and Durance having been examined, the magistrates required the plaintiff to find bail to answer the charge at the ensuing assizes; although it was contended on the part of the plaintiff that under his right of sporting he was entitled to do the act com-

plained of, and at all events was justified by the alleged permission given by Durance. What Durance stated before the magistrates was not proved on the trial of this cause. In a letter written in January, 1842, by the defendant to the plaintiff, he referred to Durance as his agent, and stated that he had authorized him to instruct his attorney to adopt legal steps for any injuries done by the plaintiff to the property; but no further communication was shewn to have been made to the plaintiff until after the information had been laid. On the 15th of June, the defendant arrived in the neighbourhood, but he was not present at the hearing of the information on the following day. On the 21st of June, a Mr. Harris called on the defendant respecting the termination of the plaintiff's tenancy, and during the conference with him, the defendant sent for the act of Parliament, 7 & 8 Geo. 4, c. 80, and after reading it, observed, "Now I have got the fellow, I will make an example of him." At the ensuing assizes, a bill for the offence was preferred before the grand jury, and ignored.

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Upon this evidence, the learned Judge left three questions to the jury; first, whether Durance acted under the authority of the defendant when he laid the information and prosecuted the proceedings against the plaintiff; secondly, whether Durance gave permission to fish the pond in question, by cutting down the bank; and lastly, whether the defendant, in taking these proceedings against the plaintiff, was actuated by evil feelings towards him, and not by a bonâ fide and genuine belief that the plaintiff had committed the offence imputed to him. The jury answered all these questions in the affirmative; whereupon the learned Judge expressed his opinion that in point of law there was an absence of reasonable and probable cause, and refused to submit any further question to the jury than that of the amount of damages; which they assessed accordingly at £400.

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In Michaelmas Term, *Crowder* obtained a rule nisi for a new trial, on the ground of misdirection: against which

Erle, Cockburn, and Barstow now shewed cause.—The three questions stated by the learned Judge were correctly submitted to the jury: and it is clear, since the decision in *Panton v. Williams* (a), that his Lordship rightly reserved to himself the decision of the question of probable cause. It is perfectly clear upon the evidence, that Durance instituted this prosecution against the plaintiff with the authority of the defendant; and equally clear that there existed no reasonable or probable cause for the prosecution in the act done by the plaintiff. It is said that the learned Judge ought also to have left it to the jury to say whether the defendant knew of Durance's having given the plaintiff permission to fish the pond, for that in the absence of such knowledge the defendant might have probable cause for the proceedings, though Durance could have none. But the answer is, that if for the gratification of his malice a man gives his agent a plenary authority to institute a prosecution against another, he is equally responsible for all that is done in it: and if the agent have no cause for the proceeding, the principal is responsible. It is his duty to inquire whether the proceeding be well founded or not. If therefore, as against Durance, there was an absence of reasonable and probable cause, that is sufficient as against the defendant, by whose authority Durance acted. It does not lie in his mouth to say that the facts were not brought to his knowledge. If a man chooses to adopt the wrongful act of another, he must adopt it with all its consequences. [*Parke, B.*—If you can make out that he authorized his servant to prosecute *right or wrong*, he may be responsible: but you must shew

(a) 1 G. & D. 504; 2 Q. B. 169.

that there was an authority to prosecute per fas et nefas, otherwise it will be construed as an authority only to do what is right.] But there was also ample evidence to shew a want of reasonable and probable cause, independently of Durance's permission, in the nature of the defendant's agreement with the plaintiff, and the circumstances of the act itself. The learned Judge, therefore, was guilty of no misdirection, for he left to the jury every fact that was material—and indeed more than were strictly necessary—to raise the question of reasonable and probable cause for his decision.

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Crowder and Montague Smith, in support of the rule.—The cutting down of the dam of the fish pond was not a justifiable act. The agreement only authorized *sporting* in the usual and legitimate mode, but the cutting down of the dam was not the ordinary mode of sporting; and the learned Judge ought to have left that question to the jury. [*Parke, B.*—Supposing it was an unsportsmanlike mode of fishing, and that the plaintiff had cut down the dam out of spite in consequence of the quarrel, still if he did it by right, or under a supposition of right, it could not be within the act, which means the doing of a wicked and unlawful act, without a colour of right.] The stat. 7 & 8 Geo. 4, c. 30, s. 15, enacts, that if any person shall unlawfully and maliciously break down or otherwise destroy the dam of any fish pond, with intent thereby to take or destroy any of the fish in such pond, every such offender shall be guilty of a misdemeanor, and being convicted, shall be liable to the punishment therein mentioned. Now if this were not the legitimate mode of sporting, the plaintiff would clearly have come within that provision, unless the defendant's agent Durance had given him permission to do so. And if the defendant had been induced to believe that the offence had been committed, and in that belief instituted the prosecution, this action would not be main-

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tainable. The learned Judge certainly left it to the jury whether Durance was the agent of the defendant in instituting these proceedings against the plaintiff, and they found that he was. Now the question is, how far the principal is to be affected by the act of his agent. Is it to be said that a principal, who may be in perfect ignorance of the wilful nature of the act of his agent, is liable in every case for his improper conduct? Clearly not. Suppose, for instance, that a servant were to come to his master and say that his fellow-servant had stolen a bottle of wine, and that he had detected him in the act, and the master were to prefer a charge before a magistrate, when it was proved that the servant who had accused the other of the felony had given it to him, would the master be liable to an action in such a case? If not, the present case is precisely similar. [*Alderson, B.*—Suppose there was really no probable cause, would it be any answer to shew that the prosecution arose from the defendant having been misinformed by an agent?] The defendant's *belief* that he had reasonable and probable cause would be sufficient; and it has never been held that the master will be liable, if you fix the *agent* with knowledge. The master cannot be liable unless it be shewn that *he* knew it. In *Musgrove v. Newell* (a), where A., having reasonable and probable cause for supposing that B. had assaulted him with intent to rob him, went for a constable, who recognised B., and assured A. that he was a respectable man, but A. nevertheless persisted in giving B. into custody, and preferred a charge against him before a justice, who dismissed it; it was held that the representation of the constable would not take away the reasonable and probable cause afforded by the other facts of the case. In *Panton v. Williams* (b), *Tindal, C. J.*, in delivering the judgment of the court, observes that "in some cases the reasonableness and probability of

(a) 1 M. & W. 582.

(b) 2 Q. B. 169, 193.

the ground for prosecution has depended, not merely upon the proof of certain facts, but upon the question whether other facts which furnished an answer to the prosecution were known to the defendant at the time it was instituted; again, in other cases the question has turned upon the inquiry, whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not." [Rolfé, B.—When the plaintiff has proved the facts shewing a want of probable cause, does it not lie on the defendant to shew his ignorance and want of knowledge? Parke, B.—In *Johnstone v. Sutton* (a), in the reasons given for the opinion expressed by Lord Mansfield and Lord Loughborough, it is said, "From the want of probable cause, malice may be and most commonly is implied. The knowledge of the defendant is also implied. From the most express malice the want of probable cause cannot be implied. A man from a malicious motive may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt; and in neither case is he liable to this kind of action." The meaning of that probably is, that want of probable cause being shewn, it lies on the defendant to shew that he was misled or acted in ignorance. Then, was not the learned Judge right in assuming the defendant's knowledge, unless the contrary were shewn?] Where the master acts for himself in instituting the proceedings, it may be so; but not where he acts from the information of his servant, and it is upon his representation that he orders him to institute the prosecution. [Alderson, B.—If you had shewn that Durance made such a statement before the magistrates as would warrant the prosecution, the defendant might then perhaps have been excused.] The master might have no means of proving it. It is not necessary for the master to prove that the servant gave him the information on which

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(a) 1 T. R. 545.

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he acted: it is the plaintiff's duty to shew the want of probable cause, for he is to make out his title to maintain the action. [*Parke, B.*—Here there was the fact of the existence of the tenancy, with the right of sporting, and that this act was done during the continuance of it, which establishes the absence of reasonable and probable cause. *Alderson, B.*—When the existence of reasonable and probable cause had been negatived in the first instance, the burthen lay upon the defendant to shew that there were facts which induced him to suppose that he had just grounds for instituting the prosecution.] In this case the magistrates had heard Durance's evidence, and thought the charge sustainable, and compelled the plaintiff to give bail to answer the charge at the assizes; and it might reasonably be inferred that there were good grounds for instituting the prosecution. [*Alderson, B.*—There is no reason for any such inference. All that passed before the magistrates was taken down in writing, and might have been proved.] The learned Judge appeared to think that unless Durance had given permission, the defendant would have had reasonable and probable cause, and he left the question as to Durance's permission to the jury, in order to guide his judgment upon that question. But even if Durance had given permission, there was no evidence to shew that the defendant knew it, but the contrary was to be inferred from the circumstances. There was, therefore, *prima facie* evidence of probable cause, which the plaintiff ought to have shewn not to exist.

They also argued that there was no evidence to shew that Durance acted as the defendant's agent in instituting the proceedings.

PARKE, B.—I am of opinion that in this case the rule ought to be discharged.

There were three grounds upon which the rule to shew cause was obtained. The first objection made by Mr.

Crowder was, that in this case there was no evidence to go to the jury that the prosecution was originally instituted and afterwards carried to a conclusion by the defendant. The Judge left to the jury the question, whether Mr. Durance acted, in preferring the information against the plaintiff, under the authority of the defendant, and afterwards prosecuted those proceedings against him under the defendant's direction. Now the only question on that part of the case was, whether there was sufficient evidence to go to the jury that what was done was done by the authority of the defendant. And there was a letter given in evidence,—which was said, indeed, not to refer to those proceedings, and very likely that may be so,—but I think that what the letter states, coupled with the conversation proved, is evidence to go to the jury that all the proceedings which took place originated from the defendant's instigation; in that conversation he says, "I have got the fellow, and I will make an example of him." It was for the jury to say, upon such a statement, whether or not these proceedings were commenced under his authority and by his direction; and my opinion is that they were.

Then the next question is, whether the Judge was wrong in not leaving a further question to the jury, viz. whether the circumstance of Durance having given permission to the plaintiff to fish the pond was known or not known to the defendant. Now if the case really turned upon the propriety of leaving to the jury the question of the permission of Durance being known to the defendant, I certainly should have hesitated before I concluded that this rule ought to be discharged; because I think that is a point deserving of a great deal of consideration. It may be, that in the absence of any reasonable or probable cause for the prosecution—if it be proved that there was no reasonable, or real, or probable cause—that may throw the burden of proof on the defendant that he believed there was. That which was stated by Lords *Mansfield* and *Lough-*

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borough, in Johnstone v. Sutton, may be construed to mean that. But in this case—even supposing an act had been committed by the plaintiff which was clearly within the act of Parliament—that is, supposing a trespass were committed by a stranger, who had no interest in the land, by breaking down a dam and draining a pond for the purpose of taking the fish, and the trespasser contended on the trial that he had a right to do so, upon the ground that one who was the general agent of the owner had given him permission, and was entitled so to do, he would be acquitted on proof that that person was the general agent of the owner, and had given him permission to commit the act. But I am disposed to think, that in an action for maliciously instituting such a prosecution, it would be incumbent upon the plaintiff to go further, and to shew that the fact was known to the defendant—the prosecutor—that such permission had been given. But it is unnecessary to give an opinion on that part of the case, because, rejecting altogether that question, whether Durance gave the plaintiff permission or not, and looking at the other facts in the case, and supposing the learned Judge to have unnecessarily left to the jury the question whether Durance in fact gave permission to the plaintiff or not, I think, upon the other facts in the case which are admitted, and with regard to which there was no question to go to the jury, that the Judge was right in saying that in this case there was no reasonable or just ground for instituting the proceedings, and that it was a malicious prosecution. What are the facts of this case? It appears that this breaking down of the dam of the pond took place in the month of April, at which time the plaintiff was tenant to the defendant of a small house and land, as part of a tenement which he held for a year, which would not expire until the month of June, 1842; and under the agreement by which he was tenant of the property, he had a right to sport over the whole of the property; and a right to sport certainly includes a

right to fish. It appears that during the time he occupied under this demise, he cut down a portion of the dam, and let out the water for the purpose of taking the fish within it. Those are facts which are admitted in the cause. It is said this is an unusual mode of fishing, and that that was a question which ought to have been left to the jury. The evidence is rather that this was a usual mode of fishing the pond, and no dispute appears to have arisen upon that; but taking it for granted that that question ought to have been left to the jury, and supposing this to have been an unusual mode, and not the mode in which sportsmen generally exercise their right of sporting, and supposing the plaintiff to have done this under the influence of malicious feelings to the defendant, from having had a quarrel with him, and received notice to quit: supposing that something would not have been done which has been done, unless the plaintiff had been incited to do it by feelings of hostility to the defendant;—granting all this to be so, is it possible for any man to say that the act of cutting this dam, to get the fish out of the pond, can come under the meaning of the act of Parliament, which is directed against those who from malicious feelings destroy the property of others, and which makes it a transportable offence if any person breaks or cuts down the dam of a pond for the purpose of taking the fish therein? I do not think there was any offence in point of fact against the act of Parliament, and it seems to me that the learned Judge was right in looking at the case in the way he did; and even supposing this question, whether this act was committed by the plaintiff under the authority of Durance, to have been answered in the negative, I think he was still right in directing the jury that there was no reasonable or probable cause for the institution of this prosecution.

It is said this must have been done by the defendant under a mistake of the law, because the magistrates before whom the case was investigated expressed them-

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selves to be of the same opinion. I think there was an excuse for the magistrates, who acted from ignorance, but there was none for the defendant, who did not act from ignorance, but from improper motives. It is said, however, by Mr. *Crowder*, that he might have been ignorant *bonâ fide*, and might have believed he was carrying into effect the intentions of the act of Parliament, even supposing he acted under feelings of spite and malice towards the plaintiff in instituting the prosecution. I think that comes within the third question left to the jury by the learned Judge, who asked them whether the defendant, in instituting proceedings against the plaintiff, acted from malicious feelings: and upon that the jury found that it was their general belief that the defendant did act from malicious feelings. Therefore, although the magistrates have chosen to permit the plaintiff to be proceeded against for this transportable misdemeanor, yet the defendant was proved upon the evidence, to the satisfaction of the jury, not to have acted under a mistake as to the meaning of the act of Parliament, but with a belief that no offence was committed at all, and he cannot be excused from the consequences to which he has subjected himself by following the course he adopted. It seems to me, therefore, with regard to the two grounds of objection taken to the course taken by the learned Judge, that neither of them can be sustained. Upon the whole, I think the verdict should not be disturbed.

ALDERSON, B.—I am of the same opinion. In the first place, it appears to me that there was abundant evidence to shew that the defendant instituted these proceedings through the medium of *Durance*. With respect to the second point, as to there being no reasonable or probable cause, I think the true way of viewing a case is this:—that the Judge has a right to act upon all the uncontradicted facts of the case, and that it is not necessary specifically to leave every fact to the jury,—to ask them, for

instance, "Do you believe this?" "Do you believe that?" "Do you think that was so and so?" It is only where some doubt is attempted to be thrown upon the credibility of the witnesses, or where some contradiction occurs, or some inference is attempted to be drawn from some former fact not distinctly sworn to, that the Judge is called upon to submit any question to the jury: but that is not the case here, for there was no reasonable ground whatever for disputing that the pond was fished in the ordinary way, and there was no pretence for saying that any act was committed in violation of the act of Parliament. I do not in the least rely upon Durance having given permission, because I am disposed to think that if his giving permission to the plaintiff was considered a material fact, it ought to have been shewn also to have been within the knowledge of the defendant, and there really was no evidence upon that subject; and therefore, if I had to form my judgment of reasonable and probable cause, I should lay the fact of Durance having given permission out of the case, and I should still say that there was none.

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GURNEY, B., concurred.

ROLFE, B.—I am of the same opinion. The only point of importance in the argument is that upon the subject of probable cause; but I concur with my brothers in thinking, that, quite independently of the circumstance of Durance's consent or non-consent, there was a total absence of reasonable and probable cause. It seems to me that in taking the fish out of the pond, the plaintiff did only that which he had a right to do, and consequently there was neither real nor probable cause. It was put in this way—did the defendant, at the time he instituted the prosecution, fairly believe that the plaintiff had violated the law? And the jury found that the defendant acted from malicious motives, and not from such a belief. That

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appears to be perfectly right, whether Durance gave his consent or not; and the fact, therefore, of not putting to the jury the question with regard to the defendant's knowledge of the permission of Durance, appears to me to be totally immaterial.

Rule discharged.

Feb. 8.

LANYON v. DAVEY and Six Others.

The plaintiff A., the pursuer of a mine, in order to carry it on, raised money by the deposit of a promissory note, made in his favour by seven of the shareholders, and which two other shareholders had refused to sign, and applied the money so raised in paying the workmen. At a subsequent meeting of the

ASSUMPSIT against the defendants, as the makers of a promissory note for £600, payable to the plaintiff; with account on an account stated. The defendant Davey, and three other defendants, pleaded, as to the second count, non assumpserunt; and, as to the whole declaration, that by an indenture, dated 17th August, 1835, and after the said promissory note became due and payable, and made between the defendants, one Ann Juliffe, and the several other persons whose names were thereunto subscribed as adventurers or shareholders in certain tin and copper mines, called "The Relistian Mines," of the first part; certain parties who were actually named, and the several

shareholders and creditors, an assignment of the mine, in order to sell it, and pay the debts, was resolved upon, and A. then claimed to be admitted as a creditor "for money which he had raised on note of hand to pay the workmen." A deed of assignment was accordingly executed, to which all the adventurers were parties of the first part, and the several persons whose names were thereunto subscribed, "as creditors of the several other persons therein-before described of the first part as adventurers, for supplies to and debts incurred by them for or in respect of the same mine, to the amounts set opposite their respective names," of the second part. This deed, after reciting that the shareholders had in the prosecution of the mine incurred debts thereon with the persons parties thereto of the second part, contained a conveyance in trust for those creditors, and a provision that no action should be brought by any of the persons parties thereto of the second part, against all, any, or either of the persons parties thereto of the first part, for the recovery of any debts due or owing upon the said mine, or in anywise relative thereto; and that if any such action was brought, the deed might be pleaded as a release. A. executed the deed, the amount of the note and interest thereon being placed against his name. To an action brought by A. upon the note against the seven persons who signed it, they pleaded the deed as a release, averring that A. signed it as a creditor of the parties thereto of the first part, in respect of the causes of action in the declaration mentioned, which allegation was traversed by the replication:—*Held*, that A. must be held to have signed the deed in respect of his claim for the advance of the money raised upon the note, and applied for the use of the mine, and not in respect of his claim upon the note itself, which therefore was not released, and that consequently the plea was not proved.

other persons whose names or styles of firms were thereunto subscribed, as creditors of the several other persons thereinbefore described of the first part as adventurers and shareholders in the said mines or adventures, for supplies to and debts incurred by them for and in respect of the same mines, to the amount set opposite to the respective names of the said creditors thereunder written, of the second part; and certain trustees of the third part [profert]; after reciting that the parties thereto of the first part were interested as shareholders in the said mines, and that they had in the prosecution of such mines or adventures incurred or contracted debts therein to and with the said several persons parties thereto of the second part, and which were then unsatisfied and unpaid, and that it had been resolved, at a meeting of the parties held on the 12th day of August, 1835, for the purpose of determining the course to be adopted for satisfying and paying off the said several debts, that the said several mines and other property belonging to them should be conveyed to the said trustees; the parties thereto of the first part conveyed the said mines and property, pursuant to that resolution, upon trusts for sale, and after payment of the expenses, to pay and apply the residue of the monies in or towards payment or satisfaction of the said several debts and demands owing by the said several persons parties thereto of the first part, unto the said several persons parties thereto of the second part, or their executors, administrators, or assigns, rateably and in proportion to the amount of the debts owing to them respectively as aforesaid, without any priority, and to the entire exclusion of such of the persons parties thereto of the first part, as might happen to be creditors in the said mines or adventures, until each of the same creditors, not being adventurers, should have received the full amount of his respective debt: and that until such sale or sales, and distribution of the proceeds as aforesaid, should have been respectively made, no action or suit should be had, brought,

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or further prosecuted by any or either of the several persons parties thereto of the second part, against all, any, or either of the several parties thereto of the first part, for the recovery of any debt or debts due and owing upon the said mines and premises as aforesaid, or anywise relative thereto, and that in case any such action or suit should be had, brought, or further prosecuted, then the debt or debts thereby sought to be recovered contrary to the provision last aforesaid, should thereupon be forfeited and void, and those presents in that case should operate as a final release of every such debt or debts sought to be recovered by such action or suit, and should and might be pleaded and pleadable in bar thereto, and to the recovery thereof as aforesaid. The plea then averred, that the name of the plaintiff was subscribed to the said indenture as a creditor of the said several persons parties to the said indenture of the first part, as adventurers or shareholders in the said mines or adventures, for and in respect of the causes of action in the declaration mentioned, the same causes of action having accrued to the plaintiff, and the said promises in the declaration mentioned having been made to him, in respect of debts which were at the time of making the said indenture debts incurred by the said several parties thereto of the first part with and to the plaintiff in respect of the said mines; that the amount of the said causes of action and debts was, at the time of making the indenture, thereon written, and set opposite to the name of the plaintiff so subscribed thereto as aforesaid; and thereupon the plaintiff made and executed the said indenture, and sealed the same with his seal as a party thereto of the second part, to wit, as such creditor of the said persons parties thereto of the first part, for and in respect of the said causes of action in the declaration mentioned; that although the said mines and property had been sold, a certain sum out of the proceeds remained still to be distributed by the trustees: wherefore the defendants said

that the plaintiff, by the same indenture and premises, released and discharged the defendants from the said causes of action in the declaration mentioned. Verification.

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The plaintiff, after craving oyer of and setting out the deed, by which it appeared that a sum of £714 was set opposite his name, replied, that his the plaintiff's name was not subscribed to the said indenture, nor was the same indenture executed by him, as a creditor of the said several persons parties thereto of the first part, for or in respect of the said causes of action in the declaration mentioned, nor did the said causes of action accrue to the plaintiff for or in respect of the debts incurred by the said several persons parties thereto of the first part, in respect of the said mines in the said indenture mentioned, *modo et formâ*: on which plea issue was joined.

At the trial before *Cresswell*, J., at the last Cornwall assizes, it appeared that the plaintiff was the purser and manager of (but not a shareholder in) the Relistian Mines, in which the defendants held shares. Debts to a large amount having been incurred by the adventurers, and the funds for carrying on the mines failing, it became a question whether the working of the mines was to be altogether stopped, or whether means could be devised for raising a sum of money to continue them in work, with a view to the sale of them as mines. Accordingly, a meeting was held on the 5th of February, 1835, for the purpose of considering this question, at which the defendants were present. At that meeting a Mr. Nicholls, the accountant to the mines, suggested that the shareholders should give a promissory note for £600 and interest, payable to the plaintiff or order, upon the indorsement of which by the plaintiff Messrs. Tweedy, bankers at Truro, would advance the amount. In accordance with this suggestion the promissory note in question was drawn and signed by the defendants, but by mistake it was not made payable to order. Two others of the

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shareholders who were present, Molyneux and Juliffe, declined to sign it, the former saying that he had paid enough, and would incur no further responsibility. The plaintiff took the note to Messrs. Tweedy, deposited it with them, and obtained the money, which was applied to the payment of the workmen in the mines.

On the 12th of August, 1835, a meeting of the shareholders and creditors was held, at which the execution of the deed in question was determined on. The plaintiff claimed to come in as a creditor in respect of the monies he had raised on the note for £600, and another note for £80 and interest, which had been subsequently cashed by Messrs. Tweedy under similar circumstances, and the proceeds applied in the same manner; amounting in the whole, as he alleged, to £700. Some objection was made to this claim, on the ground that this was not a debt due from the whole body of the adventurers, but only from those who had signed the notes; this objection, however, was ultimately waived, it being at the same time admitted on both sides that the plaintiff obtained an advantage by coming in against all the adventurers.

The £714 set opposite to the plaintiff's name was the actual amount of principal and interest due upon the two promissory notes at the date of the deed. The trustees had paid several dividends upon it to the plaintiff, whereby the amount remaining due was reduced, on the 31st December, 1839, to £400, and to recover that sum, with interest, the present action was brought. The learned Judge thought that, upon this evidence, the plea was proved in substance, and directed a verdict for the defendant, giving the plaintiff leave to move to enter a verdict for him for the amount claimed.

Erle having obtained a rule nisi accordingly,

Crowder and *Montague Smith* now shewed cause.—The plaintiff, by his execution of the deed as one of the parties

of the second part, acknowledged himself to be a creditor, to the amount set opposite his name, of the whole body of adventurers, and estopped himself from saying the contrary. Not only did he execute the deed, but he took the benefit of the dividend payable under it. It is said on the other side, that this is not a debt due from the adventurers of the mine, but from seven persons on a promissory note. But the note was given expressly to raise money for the use of the mines, and the money was accordingly raised, and so applied. The plaintiff had no other claim upon the mines than that which arose out of the transaction of the note. [Alderson, B.—This is the state of facts: the plaintiff pledges his own credit to the bankers, and lends money to the adventurers. There were, therefore, two debts; one from the adventurers, for the money so obtained and lent, the other from these defendants, upon the note. The fallacy is in treating the plaintiff as if this note were his claim upon the adventurers.] The purser of a mine cannot borrow money from a banker, and fix the adventurers with liability for the loan, without their express authority. *Hawtayne v. Bourne* (a). Here two of them expressly refused to incur liability: the other adventurers, therefore, were not bound for that debt; consequently there was no original debt from all the adventurers, and the plaintiff's only claim was upon the note, in respect of which he was permitted to come in under the deed against all the adventurers. The only debt is that on the note. [Parke, B.—There is the fallacy: there is also the debt for the money borrowed by the plaintiff on his own credit from Messrs. Tweedy, and advanced by him to the mine. Rolfe, B.—Even if he came in as a creditor under the deed, not being entitled, that will not make *this* the debt of the adventurers.] Can it be said that it was not a debt incurred in respect of the mines, within the meaning of the deed?

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[*Alderson*, B.—Suppose a total stranger had signed the note, to induce the plaintiff to obtain money which he should advance as a loan to the adventurers, and the plaintiff obtained and advanced the money accordingly, and then signed the deed. He signs it in respect of the loan of money which he obtained from his bankers, and still has an action upon the note against the makers. It only makes a complication in fact, but no difference in law, that the parties signing the note are some of the adventurers.] It would be giving the plaintiff a most unfair advantage, that he should be enabled to claim and receive dividends under the deed, and should also have the personal security of the defendants. That never could have been the intention of the parties. He would not have been permitted to come in as a creditor under the deed, but that he took upon himself that this note was a debt only in respect of the mines. Suppose all the adventurers had signed the note, would not that have been a debt in respect of the mines? and it was the same, in the understanding of the parties as if they had done so. [*Parke*, B.—The terms of the deed only permit the plaintiff to sign as a creditor of all the adventurers: in respect of the advance of money, he was the creditor of all; in respect of this note, of some of them only. The deed is only a release in respect of the funds provided, and the funds provided are for all the adventurers.] But he is by the terms of the deed bound not to sue them or any of them. [*Parke*, B.—That is only in respect of the debts barred, which are the debts of all. The deed releases the original debt, for money advanced; but whether it releases the note or not, is quite another question, depending upon all the circumstances.] The words are quite large enough to comprehend the claims upon the note; they include actions “against all, any, or either of the several persons parties thereto of the third part, for the recovery of any debt or debts due or owing upon the said mines and premises as aforesaid, or in any-

wise relating thereto." The plaintiff was admitted to sign as a creditor on the express ground that he would thereby have the advantage of the liability of all the adventurers: how could that be so, if all were liable to him before? The debt upon the note, therefore, must have been the debt for which it was intended he should have a claim against all under the deed.

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Erle and *Smirke*, in support of the rule, were stopped by the Court.

PARKER, B.—It appears to me that the plea of the defendants in this case has not been proved. If it had been differently framed, it might have been proved by the evidence; but then the plaintiff might have replied so as to answer it. The plea sets forth a deed to which the creditors of all the adventurers in this mine were parties, containing a provisional release to them of the several debts mentioned in it as being due from them all; and it then proceeds to allege, that the name of the plaintiff was subscribed to that deed as a creditor of, and in respect of debts incurred by, the whole of the adventurers, and that the deed was executed by him as such creditor of them all, in respect of the debts and causes of action in the declaration mentioned; that is, in respect of a promissory note, which is the note of seven of the adventurers only. This averment is traversed by the replication: and upon the evidence, it becomes a question partly of fact and partly of law, whether the plaintiff did execute the deed in respect of the debt mentioned in the declaration. Now upon that point the evidence is this:—There is a discussion respecting the means of raising money for the purpose of carrying on the mines, which ultimately terminates in the plaintiff's going to Messrs. Tweedy, the bankers, and procuring, upon the deposit by him of this promissory note, (it was originally proposed to be upon the indorsement of the note, but it was not found to have been indorsed,)—which is a note

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signed by seven of the adventurers, two others expressly refusing to become parties to it,—the sum of £600, which was applied in paying the wages of the workmen employed in the mine. That was the purpose for which the money was borrowed. Then, at the final meeting, on the occasion of the signing of the deed, a difficulty arises with respect to the plaintiff's claim, which he asserts, according to the evidence, to be "to sign for monies borrowed to pay the workmen, which he had raised on his notes of hand." Now at that time the plaintiff had an undoubted claim upon the note against the seven persons who had signed it, but against no others: he had also a claim against all the shareholders for the money advanced by him for their use, to pay the workmen, if they all had, either expressly or impliedly, sanctioned that advance: and his claim, at this meeting, was evidently based upon the latter right. It is said, however, that he executed the deed as a creditor in respect of the note: but the whole frame of the deed excludes such a supposition, while it is altogether consistent with the idea that it was executed in respect of the money lent. Standing in the condition I have mentioned, he must have signed the deed for the debt which he would have against all if all authorized it, not for the note, on which he could not possibly have any remedy except against the parties who made it. The deed admits nobody to sign but those who are creditors of all the adventurers; we must therefore take it that the plaintiff signed for the debt of all. Whether his remedy on the note fails in consequence, or is reserved to him, is no question on these pleadings. If the parties to the note had been strangers, it is clear there would have been no difficulty; that they are shareholders only complicates the case a little in point of fact, but makes no difference in point of law. This deed, therefore, operated as a release of the original debt, but not of the note: and this rule must consequently be made absolute.

ALDERSON, B.—I am of the same opinion. It is quite clear upon the facts, that the plaintiff did not sign the deed in respect of any debt due from the body of adventurers upon this note, but in respect of money, the produce of the note, which he had advanced to the whole body of adventurers, and for which, as he alleged, they were all liable; and upon the facts I think it is very probable they were. The meeting being held to consider the means of raising money to carry on the mine, it was understood that the bankers would advance it if the note were given to the plaintiff, and then it was arranged that the money should be so raised and appropriated; and although they did not all agree to make themselves responsible upon the note which the plaintiff is to take to the bankers for that purpose, yet they evidently all assented to and became liable in respect of the loan to themselves of the fund raised upon it, and expended in the payment of their workmen: and it is in respect of the money so borrowed from the bankers, and so lent to the shareholders by payment of their servants, that the plaintiff claimed and was admitted to sign the deed. But why should that prevent him from claiming upon the note against the persons who, by signing it, had induced him to take upon himself the responsibility of borrowing that money? The release, therefore, operates upon that debt for money lent only, and not upon the debt due on the note; and the consequence is, that the verdict upon this issue ought to be entered for the plaintiff.

GURNEY, B.—The plaintiff had no claim to sign the deed except as a creditor of all the adventurers, and we must take it that he signed in the only character in which he legally could sign.

ROLFE, B.—I am of the same opinion. This note being signed by some only of the adventurers, the case is exactly the same as if it had been signed by a stranger.

Rule absolute.

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TINDALL and Another v. BELL and Another.

In an action for running down a ship, it appeared that the plaintiff had been obliged in consequence of the injury to employ a steam-tug, the owners of which demanded £150 for salvage, and commenced a suit in the Court of Admiralty against the plaintiff, who paid £20 into Court; the Court ultimately decreed £45 to the salvors:—*Held*, upon these facts, that the plaintiff was not entitled to recover the amount of the costs incurred by him in that suit.

Seemle, that the proper question for the jury in such a case is, whether, in respect to the suit for salvage, the plaintiff pursued the course which a prudent and reasonable man would do in his own case: and that if the jury think he did, the costs of the suit may be recovered.

CASE for running down a ship of the plaintiffs; alleging as special damage, that the plaintiffs were thereby obliged to engage and accept a certain steam-tug for the salvage of the said ship, and in consequence thereof were forced and obliged to pay, and necessarily did pay, to the owners of the said steam-tug, divers large sums of money, amounting to &c., for salvage, and also a certain other large sum of money amounting to &c. for certain costs and charges incident thereto. Plea, not guilty.

At the trial before *Wightman, J.*, at the last Bristol assizes, it appeared that one of the items in the damages claimed by the plaintiffs consisted of a sum of £124, part of which they had paid to the owners of the steam-tug as costs in a suit instituted by them against the plaintiffs for salvage in the Court of Admiralty, and the remainder of which was their own costs incurred in the defence of that suit. The owners of the steam-tug had originally demanded the sum of £150: the plaintiffs offered them £20, which they refused, and commenced a suit in the Court of Admiralty. The plaintiffs paid the £20 into Court, that sum being considered by their agent, who was a person conversant with such matters, to be a sufficient compensation: the suit proceeded, and in the result the salvors obtained a judgment for £45 and costs. It was not shewn that the present defendants had any notice of these proceedings; and it was insisted on their behalf, first, that the employment of the steam-tug was not necessary; but secondly, that even if it were, the plaintiffs were not entitled to recover against the defendants the costs in the Admiralty Court, which ought never to have been incurred. The learned Judge left it to the jury to say whether the assistance of the steam-tug was necessary, and they

found that it was: and a verdict was taken for the plaintiffs for an amount including the £45 paid for salvage under the decree of the Court of Admiralty, leave being reserved to the plaintiffs to increase the damages by £124, the amount of the costs, if the Court should be of opinion that the plaintiffs were entitled to recover them also.

In Michaelmas Term, *Bompas*, Serjt., obtained a rule accordingly; against which

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Erle and *Barstow* now shewed cause.—The defendants, having had no notice of the proceedings in the Admiralty Court, so as to enable them to come in and undertake the defence of the suit, cannot be held liable for the costs of that litigation. This is not the case of a *contract of indemnity*, in which case only a claim can be sustained for the costs of proceedings unnecessarily defended by the plaintiffs: *Penley v. Watts* (a). Here it was at the plaintiffs' risk that they stood out for a less sum than that demanded by the salvors. In *Short v. Kalloway* (b), Lord Denman, C. J., says—"No person has a right to inflame his own account against another, by incurring additional expense in the unrighteous resistance of an action which he cannot defend." *Walker v. Hatton* (c) was a much stronger case than this: there the conduct of the defendant had been most vexatious, yet the costs incurred in defending an action in which the plaintiff had failed, were held out to be recoverable, the contract of the defendant not amounting to a contract of indemnity. This is not a case of *contract* at all, but of *tort*; the defendants are liable only for the necessary or natural consequences of the collision; and how could these costs be such? [*Parke*, B.—The parties are in the same situation as if the defendants had entered into a contract with the plaintiffs not to do the wrong complained of. That is not a contract of indem-

(a) 7 M. & W. 601.

(b) 11 Ad. & E. 28.

(c) 10 M. & W. 249.

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nity.] Certainly not. It must be taken that £45 was fairly due to the salvors, and the plaintiffs had no right to contest it and offer a smaller sum; they ought to have tendered a proper amount, or at least to have paid it into Court, and had no right to run the risk and make the experiment of cutting down the claim of the salvors at the defendants' expense.

Butt, contra.—If the defendants had entered into a contract not to run down the plaintiffs' vessel, they would have been liable to these costs, as being the necessary consequence of the act complained of. This case is distinguishable from the cases of contract which have been referred to. Where the defendant binds himself to do a thing in consideration of the plaintiff's contracting to do another thing, the latter has no right to refuse to perform his contract, and so to throw upon the defendant any part of the costs arising from his own default. But here there is no contract as to the salvage; and these are costs necessarily incident to the suit for salvage. [*Parke*, B.—The difficulty is, that the plaintiffs might have saved themselves from all these costs, by tendering a reasonable sum.] According to the practice of the Court of Admiralty, no tender out of Court is available. [*Parke*, B.—But surely such a tender, if made, affects the costs of the suit. *Alderson*, B.—It is stated in *Abbott on Shipping*, 511 (6th edit.), that "Where a well-founded claim of salvage has been entered in the Court of Admiralty, the proper course to be pursued by the defendant, in order to save the expense of further proceedings, is to tender in the first stage of the cause, by acts of Court, and not personally and verbally, to the claimant, a specific sum for the salvage, accompanied by an offer to pay the costs. The Court will then consider the sufficiency of the sum tendered, and if it shall be thought sufficient, will make the party who refuses the offer liable, not only for his own costs, but also

the costs of the other side, if it shall appear that the proceedings have been vexatiously pursued."'] According to that authority, a tender can only be made after a suit has been commenced, and before suit it would have no more effect than a tender of unliquidated damages, before action, in a Court of law. By no effort, therefore, could the plaintiffs have saved these costs, without paying an exorbitant demand, which the Court of Admiralty have held not to be sustainable. The plaintiffs exercised the best discretion they could, and cannot be required to do more than pursue the course which a prudent man, acting on his own account, would have adopted. The result shews that they ought not to have paid the £150 without suit; and a tender of the £45, which by the judgment of the Court is the proper sum, would not have prevented the suit's proceeding. [*Parke, B.*—I am not prepared to say that the principle you have laid down is incorrect, that the necessary consequences of the wrong are what a prudent man would reasonably do to repair the mischief. It is perhaps like the cases in insurance law, where the question is whether a prudent man would repair or sell the ship. But you should have asked the learned Judge to leave it to the jury whether the plaintiffs had done what a reasonable man could be required to do, in order to settle the suit: that point was not left to the jury, and if we are to suppose that the question is left to the Court as to a jury, there is the strong observation against you, that the Court of Admiralty, who could form the best judgment upon the matter, have said that £45 was the proper sum to be paid, by tendering which, therefore, you might have saved all these costs.] The event alone ought not to be looked at, to ascertain whether the course adopted was that of a prudent and reasonable man. The parties have to exercise their judgment *at the time*, and all that can be required of them is a reasonable decision under all the circumstances.

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PARKE, B.—In truth the question in this case is one rather of fact than of law, and I think Mr. *Butt* has presented to us the true principle of determination; namely, that when the mischief is done, the necessary consequences of it are, what a reasonable man would do under similar circumstances, where he had no other judgment but his own to resort to; and it may be one of them that he should incur litigation. This question was not left to the jury; the plaintiffs did not require that it should be so left. If it had, the jury would probably have found that as the Court of Admiralty, which had the means of forming the best judgment upon the circumstances, thought £45 the proper sum to be paid to the salvors, the tender of a less sum was not the course that a reasonable man ought to have pursued. And taking the question to be reserved by consent for the consideration of the Court, I cannot say I am satisfied that the plaintiffs did conduct themselves as prudent men reasonably ought to do, in tendering so small a sum as £20. It is true this is judging by the event, but we have nothing else to judge by upon the evidence. The case very much resembles the cases of *repairs*, in which it has been held that if the party chooses to stand the consequences of an action by the tradesman for the value of the repairs, he cannot charge the expense of that as a consequence upon the party who did the original wrong, whereby the repairs became necessary.

ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Rule discharged.

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ASSUMPSIT for money had and received, and upon an account stated. Plea to the first count, that the sum of money therein mentioned was received by the defendant as the agent and servant of the plaintiff; and that after the making of the promise of the defendant in the said first count mentioned, and before the commencement of this suit, to wit, on the 7th July, 1840, the plaintiff directed and requested the defendant to forward and send the said sum of money by post, inclosed in a letter from the defendant to the plaintiff, to wit, from the Bethnal Green Road, in the county of Middlesex, where the defendant then resided, to Mousley in the county of Leicester, where the plaintiff then resided. And the defendant further says, that he the defendant did then forward and send the said sum of money by post, inclosed in a letter from the defendant to the plaintiff, to wit, from the Bethnal Green Road aforesaid to Mousley aforesaid, in manner and form as the plaintiff had so directed and requested him the defendant to do as aforesaid. Verification.

To a count for money had and received, the defendant pleaded, that after the making of the promise, to wit, on &c., the plaintiff requested him to send the said sum of money to him by post, and that he did so: —*Held* bad on special demurrer, for want of an averment, either that there was no prior request to pay, or that the defendant was always ready to pay.

Special demurrer, for the following causes:—That the plea was argumentative, inasmuch as, even supposing it to amount to a plea of payment, yet such fact was only stated by way of argument or inference, and that matters which properly afforded evidence of the fact of such payment, and which should, according to the rules of pleading, have been offered as evidence to the jury under the plea of payment, and not pleaded in bar, were improperly pleaded in bar: that the plea admitted the cause of action, but did not avoid the same by shewing accord and satisfaction thereof: that the plea did not answer all it professed to answer, because it was pleaded to the first count generally, but did not offer any defence to the damages sustained by reason of the non-performance of the promise as to that count:

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that it was not stated that the defendant paid, or the plaintiff accepted, the matters mentioned in the plea, in accord and satisfaction of the causes of action in the first count mentioned: and that the plea consisted merely of evidence, and did not sufficiently shew that the matters mentioned in it occurred before breach of the defendant's promise. Joinder in demurrer.

W. H. Watson, in support of the demurrer.—This plea is bad on several grounds. First, it does not sufficiently confess and avoid the cause of action. [*Parke*, B.—It shews that the defendant has paid the money in the way the plaintiff directed him.] It does not shew that he paid it, or that the plaintiff accepted it, *in satisfaction*. It is a circuitous and argumentative mode of pleading payment. The facts alleged in it might be good evidence to support a plea of payment, but it is not in form properly so pleaded, because it does not shew either that the plaintiff desired the money to be sent, or that the defendant did send it, in satisfaction of the cause of action mentioned in the declaration. [*Parke*, B.—Would it not have been a good plea to say that the defendant was always ready to pay the debt, and tendered it?] Yes. [*Parke*, B.—Then is it not an equally good plea to say that he was always ready to pay the debt, and on such a day did actually pay it.] But here the order to send the money by the post may have been years after the receipt of it by the defendant, and he may have been receiving interest upon it in the mean time. The money is alleged in the declaration to have been payable on request, and therefore there was an immediate cause of action, which created a damage, and there is no answer to that damage in the plea. [*Parke*, B.—That appears to be so. In the case of a covenant to pay money on a particular day, payment on that day is a denial of the breach: but in the case of an action for a debt payable on request, i. e. immediately, payment is new

matter, and must therefore be shewn to have been made in satisfaction.] *Esch. of Pleas, 1843.*

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Dowdeswell, in support of the plea.—This is a count to recover a specific sum of money had and received by the defendant to the use of the plaintiff, and which the defendant is alleged to have promised to pay *on request*. There is no breach of the promise until there has been something like a requisition to pay. [*Parke, B.*—No; the action lies without request, the money being payable *instantly*.] There the writ is the request; but here it is shewn that a previous request was made to the defendant, and that he complied with that request. Suppose the case of money deposited at a banker's; there is no breach of his duty until the party has applied to him for payment. [*Parke, B.*—You do not aver that this was the *first* request; therefore the defendant may have committed a breach before.] It ought not to be inferred that there was any prior request; the Court will not presume a wrong. The plaintiff should have replied a prior request, if any such were made. Here the defendant gets rid of his duty, by shewing that when a request for payment was made, he exactly complied with it.

PARKE, B.—The plea cannot be supported as it stands. You had better amend; either aver that the money was paid in satisfaction, and make these facts the evidence of it, or allege that the defendant was always ready to pay, and on a certain day did pay, when requested.

Leave to the defendant to amend on payment of costs; otherwise

Judgment for the plaintiff (a).

(a) See *Giles v. Hartis, Ltd.* East, 167; *Poole v. Tumbidge*, Raym. 254; *Hume v. Peploe*, 8 2 M. & W. 223.

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ATKINSON and Another *v.* DAVIES.

Feb. 25.

To a declaration by the payees against the acceptor of a promissory note, the defendant pleaded that one T. D., the brother of the defendant, then deceased, was in his lifetime indebted to the plaintiffs in a large sum of money, to wit, to the amount in the promissory note specified; and that after his death, and before interment, one of the plaintiffs, by a threat, that, unless the defendant would make and deliver the note, the plaintiffs would prevent the funeral of his brother from taking place, procured the making of the note from the defendant, who then made and delivered the same upon such threat, and for no other cause whatever. The

ASSUMPSIT by the payees against the maker of a promissory note for £400. Plea, that one Thomas Davies, the brother of the defendant, now deceased, in his lifetime, and continually to and at the time of his death, was indebted to the plaintiffs in a large sum of money, to wit, the amount of the money in the said promissory note specified, and that after the death, and before the interment of the said T. Davies, to wit, on &c., the plaintiff Atkinson, by a threat and representation that, unless the defendant would make and deliver the said promissory note to the plaintiffs, the plaintiffs could and would prevent the funeral of the said T. Davies, the defendant's brother, from taking place, obtained and procured from the defendant the delivery of the said promissory note, and he, the defendant, then made and delivered the same to the plaintiffs, upon such threat and representation, and for no other cause whatever: and the defendant further saith, that there never was any consideration for the making and delivery of the said promissory note; and that he, the defendant, never was executor or administrator of the said T. Davies, deceased, nor ever had or intermeddled with, nor had he then any of the estate or effects of the said T. Davies, deceased, nor was he nor is he in any respect liable to be sued in respect of any debt or debts of the said T. Davies, deceased, and that the plaintiffs had always held,

plea also averred that there never was any consideration for the making of the note, and that the plaintiffs always held the same without value. Replication, that one of the plaintiffs did not by a threat, that, unless the defendant would make and deliver the note, the plaintiffs would prevent the funeral of the defendant's brother from taking place, procure from the defendant the note, in manner and form alleged:—*Held*, that the replication was a good answer to the whole plea.

Held, secondly, that where a replication traverses part of a plea, but leaves unanswered so much of it as forms a defence to the action, at the same time not expressly admitting it, the Court cannot give judgment non obstante veredicto, or arrest the judgment, but the proper course is to award a replender.

and then held, the said promissory note, without any value or consideration. Verification. *Esch. of Pleas,*
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Replication, that the plaintiff Atkinson did not, by a threat or representation, that, unless the defendant would make and deliver the said promissory note, the plaintiffs could and would prevent the funeral of the said T. Davies from taking place, obtain or procure from the defendant the making of the said promissory note, modo et formâ.

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The case was tried at the last Bristol Assizes, before *Wightman*, J., when a verdict was found for the plaintiffs.

Butt, in Michaelmas Term last, obtained a rule to shew cause why judgment should not be entered for the defendant, non obstante veredicto, or why the judgment should not be arrested, on the ground that the replication, not having traversed, had admitted the allegations in the plea, that there never was any consideration for the making of the note, and that the plaintiffs had always and then held the same without value, to be true, which was a sufficient answer to the action.

Addison shewed cause (February 9).—As the plea contains no allegation that the note was given on account of the debt due from the defendant's brother, the latter part of the plea, which states that the defendant was not executor nor intermeddled with the assets of the deceased, is totally superfluous. If it had stated that the note was given on account of the debt due from the deceased's brother, it might have been important, because it would then have come somewhat within the decision in *Serle v. Waterworth* (a); but as it does not, the averments that there never was any consideration, and that the plaintiffs held the note without consideration, are unnecessary, and may

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be rejected. The substantial part of the plea is, that the note was obtained by a threat to stop the funeral of the defendant's brother, and that is traversed by the replication. This is nothing but a plea of want of consideration, stating the special circumstances, which shew that there was no consideration for the note. It would have been illegal to prevent the burial of the corpse, and therefore the plaintiffs' refraining to interfere could be no consideration. If the statement respecting the threat were struck out, the plea would have been demurrable; for in *Stoughton v. Earl of Kilmorey* (a), it was held that the general plea of no consideration, (which would then be all that remained), was demurrable; and the argument on the other side must go to this extent, that although the plaintiffs might have demurred to this plea, if those circumstances had not been stated in it, yet the plaintiffs are not at liberty to traverse them when they are stated. Where a party pleads facts, specially shewing want of consideration, he is confined to them, and cannot at the trial go into others; and therefore if the whole plea had been traversed, the issue would have been confined to the facts stated; so that there can be no admission by not traversing that, which if traversed would have been no part of the issue, or provable under it. The construction which the defendant seeks to put upon this plea would render it double and inconsistent, but the Court will not put such an interpretation upon it, for, after pleading over, the rule is, that that construction is to be adopted which will support the pleading. The Court cannot supply the allegation that the note was given on account of the debt due from the defendant's brother; and no such inference will be drawn to destroy this verdict. If there is any ambiguity in the plea, it ought, after verdict, to be construed most strongly in favour of the plaintiffs, who have succeeded.

(a) 2 C., M. & R. 72.

Butt, *contra*.—If this is a double plea, the defendant is entitled to judgment, as sufficient of it remains untraversed and unanswered to shew that the plaintiffs had no cause of action. Part of this plea amounts to a general plea of no consideration, and if the averment that “there never was any consideration for the making or delivery of the said promissory note” had stood alone, and issue had been joined upon it, and that issue found in favour of the defendant, or if the plaintiff had confessed it, the defendant would have been entitled to judgment: for a general plea of no consideration is good unless it be specially demurred to, as it was in *Stoughton v. Earl of Kilmorey*. That case decided that the facts shewing a want of consideration must be set forth affirmatively, or the plea will be open to a special demurrer; but if issue is joined and found for the defendant, it is good. That case however is not applicable to the present, where the defendant has pleaded a double plea; for one part of the plea states the special facts shewing the want of consideration, and another and distinct part pleads generally no consideration. The former part of the plea is immaterial as respects the latter part of it. The plaintiffs, for the purpose of getting rid of the difficulty, should have replied *de injuriâ*, which would have put the whole plea in issue, or should have demurred specially. But assuming the plea not to be double, still the material part is that which denies the existence of any consideration, and the part traversed is unimportant; for supposing the immediate cause for giving the note was the alleged threat, still if there was any consideration, as for instance one founded upon an antecedent debt due from the defendant’s brother, the note would be good: and such a state of facts is not inconsistent with the traverse taken by this replication. [*Parke*, B.—On what ground ought we to arrest the judgment? If there are two issues tendered, and the plaintiff only traverses one, does he sufficiently admit the other so as to entitle the plaintiff to

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judgment?] *Rand v. Vaughan* (a) shows that the proper mode of taking advantage of this defect is by motion to arrest the judgment. If both parts of the plea were material, the plaintiff should have traversed both. [*Parke, B.*—You say that because a part of a plea which forms a ground of defence is not traversed, it is therefore admitted. That point was recently before this Court in the case of *Lewin v. Edwards* (b), where a venire de novo was awarded; but in *Gwynne v. Burnell* (c), which underwent much discussion in the House of Lords, the rule as to admissions upon the record was held to apply only to cases in which there was an express admission, or a pleading in confession and avoidance.]

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—A rule nisi was obtained in this case by *Mr. Butt* to arrest the judgment, on the ground that the replication, which put in issue a part of the plea only, admitted the residue to be true; and that such residue was a good answer to the plaintiffs' demand. After argument, and a careful consideration of the pleadings, we are of opinion that the replication was a good answer to the whole plea, and therefore the rule must be discharged.

The plea, to an action on a promissory note, by the payees against the maker, states that the deceased brother of the defendant was indebted to the plaintiffs in the amount of the note, and that before the interment of the brother, the plaintiff, by a threat, that unless the defendant would make the note and deliver it to him, he could and would prevent the funeral of the brother from taking place, obtained the making and delivery of the note, and

(a) 1 Bing. N. C. 767; 1
Scott, 670.

(b) 9 M. & W. 720.
(c) 6 Bing. N. C. 453.

that the defendant made and delivered the same upon such threat, and for no other cause whatsoever, and that there never was any consideration for the making or delivery of the note. The plea proceeds to aver, that the defendant never was executor or administrator of his deceased brother, or intermeddled with his effects, or was in any way liable to be sued for his debts, and that the plaintiffs held the note in question without any value or consideration.

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The replication states that the plaintiff did not by a threat that, unless the defendant would make and deliver the note, the plaintiffs could and would prevent the funeral, obtain the note from the defendant, and concludes to the country.—On issue joined, the verdict was for the plaintiffs.

It will be observed that the statement of the debt being due from the defendant's brother is in no way connected with the giving of the note,—the note is not said to have been given by way of payment of it; that statement therefore must be rejected, as well as the one which relates to it, that the defendant was not executor of his brother, nor liable for his debts. The part of the plea which remains, and is alone to be answered, is that the note was given by reason of a threat to stop the funeral, and not for any consideration:—and the question is, whether the replication answers the material allegation in the plea, by denying that the note was given by reason of the threat.

Under the new pleading rules, it is not enough to state that a note or bill was given *without consideration*, but the cause of the making or drawing must be stated affirmatively; as that it was made for the accommodation of another: *Stoughton v. Lord Kilmorey (a)*. This plea would therefore have been bad on special demurrer, if it had stated merely that there was no consideration; the

(a) 2 Cr., M. & R. 72.

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affirmative statement that the note was given in consequence of a threat alone makes the plea good, and consequently is material, and the traverse of that allegation is an answer to the whole plea. In like manner, in the case of an averment in a plea stating a note to have been given for the plaintiff's accommodation and without any consideration, a traverse that the note was given for accommodation would dispose of the whole plea.

The rule to arrest the judgment must therefore be discharged.—I must however add, that if we had thought that the replication was no answer to the plea, it does not follow that the judgment would have been arrested. The opinion of all the judges in the case of *Gwynne v. Burnell* (a), that judgment non obstante veredicto can be awarded on a pleading by the defendant in confession and avoidance only, and not on the implied confession in a rejoinder of the part of a replication which it does not answer, seems to lead to the conclusion that the judgment for the plaintiffs could not be arrested, on the ground that the traverse of a part of a plea contains an implied confession of the residue. The proper course seems in both cases to award a replader. In *Lewin v. Edwards* (b), this point was not made, nor discussed; and the dictum in *Rand v. Vaughan* (c) was prior to the case of *Gwynne v. Burnell*.

Rule discharged.

(a) 6 Bing. N. C. 453, in Dom.
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(b) 9 M. & W. 728.

(c) 1 Bing. N. C. 769.

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CLARK and Others v. BULMER and Others.

ASSUMPSIT. The first count was on a bill of exchange drawn by the plaintiffs upon and accepted by the defendants, under the style and description of the owners of the Byers Green Colliery, for 833*l.* 6*s.* 8*d.*, three months after date. The second count was an indebitatus assumpsit in £3000 "for the price and value of a main engine and other goods then sold and delivered" by the plaintiffs to the defendants at their request; with counts for money paid, and on an account stated.

To the count on the bill of exchange, the defendants pleaded that they did not make the bill, and to the residue of the declaration non assumpsit, on which issue was joined. At the trial before Lord *Denman*, C. J., at the last summer assizes for the county of York, the acceptance of the bill by one of the company of the Byers Green Colliery was proved, but it having been objected in the course of the cause that a mining company could not bind the partnership by bills of exchange or promissory notes, that count was abandoned by the plaintiffs, who relied on the indebitatus counts. It appeared that in 1839 a steam engine was built by the plaintiffs for the defendants, pursuant to the order contained in the following letter:—

"Messrs. John Clark & Co. *Stockton*, 1 Aug. 1839.

"Gentlemen,—In answer to yours of yesterday, the Byers Green Coal Company at their last meeting agreed to accept your proposal to build an engine of 100 horse power for the sum of £2500, *to be completed and fixed* by the middle or end of December next, the engine to be built agreeably to Mr. Thomas Forster's drawing and specifications.

"I am, Gentlemen,

"Your obedient servant,

"Geo. Wm. Todd,"

[one of the defendants].

Indebitatus assumpsit in the sum of £3000 "for the price and value of a main engine and other goods *sold and delivered.*" It was proved at the trial, that the contract was "to build an engine of 100 horse power for the sum of £2500, to be *completed and fixed* by the middle or end of December;" and it appeared that the different parts of the engine were constructed at the plaintiff's manufactory, and sent in parts at different intervals to the defendant's colliery, a distance of twenty miles, where they were fixed piecemeal, and so made into an engine:—*Held*, that the price agreed upon was not recoverable in the above form of action.

Semble, that the proper form of count was, either in indebitatus assumpsit for work, labour, and materials, or for erecting and constructing an engine.

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It appeared that parts of the engine were built at Sunderland, where the plaintiffs' manufactory was situate, and sent from thence to the colliery at Byers Green, a distance of twenty miles. Parts of it were taken to the colliery in June, and the remainder in September, 1840, when it was completed. Credit was given for payment of part of the price, and the action was brought for the third instalment, for which the bill was given. It was objected for the defendants, that as the agreement was for an engine to be completed and fixed, there ought to have been a count for work and labour and materials, as well as for a main engine and other goods sold and delivered, and that, as the record stood, evidence should have been adduced to shew the value of the engine, as distinguished from the cost of fixing it; but the learned Judge overruled the objection, and the plaintiffs obtained a verdict on the second count of the declaration, for 833*l.* 6*s.* 8*d.* *Dundas*, having in Michaelmas Term last, obtained a rule to shew cause why there should not be a new trial on the ground that the proper form of action was for work and labour and materials,

Knowles and *Martin* shewed cause.—The objection is, that the declaration does not contain a count for work and materials, and that there are no words in the second count applicable to the fixing of the engine. But such a count is not necessary, as the contract for the engine is a contract for an entire thing, which having been supplied to the defendants, the price of it may well be recovered under the indebitatus count for a main engine sold and delivered. *Cotterill v. Apsey* (a) and *Tripp v. Armitage* (b) will be relied upon on the other side; but those cases are distinguishable. In the former case, the contract was for the building of a house, which the Court said was an entire contract to do several things mixed up together, that the plaintiff

(a) 6 Taunt. 322.

(b) 4 M. & W. 687.

had professed in his declaration to state those things, but as there was no mention among them of materials, nothing of that nature could be recovered. This is not an action for parts of the engine, but for a main engine sold and delivered, and the contract was to build an engine of 100 horse power for £2500. There is therefore a price fixed, and as soon as it is finished, there is a chattel for which the price is to be paid. This is not an engine until it is put together, which was done at the defendants' colliery. An engine of this nature is never sent out as a whole, but in parts, which are afterwards put up together in the spot where it is to be used. The plaintiffs contract to build an engine to be completed and fixed; but it is not an engine until it is completed and fixed. There is no difference between the terms fixing and building, because it is not built until it is fixed. Fixing is merely the putting the parts together in the place where it is to be used as an engine to pump up the water from the coal-mine. If this had been a contract for several pieces of iron made in a particular manner, there might be something in the argument, but the contract here was for a complete and perfect thing. There is no distinction between the first piece of labour to be applied to it, and the last thing that is to be done to it to render it complete. A main engine is an engine fixed to the ground fit for work. It has been said that as work, labour, and materials have been applied in the construction of this article, the proper count would be for work, labour, and materials. But if that be so, you could not recover for goods sold and delivered in hardly any case that can be suggested: for when a butcher or a baker sends goods to a customer's house, there is labour applied. This was not an article delivered until it was finished and complete for doing the particular work for which it was required, and which was the thing contracted for. In *Atkinson v. Bell* (a),

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(a) 8 B. & Cr. 277, 283; 2 Man. & Ry. 292.

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Bayley, J., in speaking of the counts for work and labour, says, "If you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labour and your materials to any other person. Having bestowed his labour at your request on your materials, he may maintain an action against you for work and labour. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labour and materials to any other person. No right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for, and the employer accepted it, the party employed may maintain an action for goods sold and delivered; or, if the employer refuses to accept, a special action on the case for such refusal. But he cannot maintain an action for work and labour, because his labour was bestowed on his own materials, and for himself, and not for the person who employed him." Here is a chattel to which everything that is to be done for it to render it complete is to be done by the plaintiffs, cost what it may, and they cannot maintain an action for work and labour, because it is employed on their own materials. It is not work done for the defendants, but for themselves, the plaintiffs, until the thing contracted for is completed. The contract was for an engine—not for the several parts but the whole. Fixing is as much a part of the engine as putting in the first screw: and it is not a main engine until it is fixed and put up fit for work. It is then a main engine sold and delivered, in the strictest sense of the words. But it is said that this being to be fixed to the freehold, it becomes a fixture, and that the prices of fixtures cannot be recovered under a count for goods sold and delivered, and *Lee v. Risdon* (a) will perhaps be relied on. But that case has

(a) 7 Taunt. 188.

nothing to do with the present. It was there held that you cannot recover fixtures to a house under the term "goods." It does not appear what the fixtures consisted of, but it is apprehended they were the ordinary fixtures, which could not be seized under an execution. *Cotterell v. Apsey* (a) has likewise no application to this case. It was there merely held that the plaintiff could not recover for work and materials on a count for goods sold and delivered, which cannot be disputed. In *Tripp v. Armitage* (b), it was held that the assignees were not entitled to the sash frames as being work already done, they not having been *fixed* to the hotel: which is in favour of the doctrine here contended for. In *Hallen v. Runder* (c), where A., having occupied a house as tenant to B., in which there were fixtures which A. had a right to remove during his tenancy, agreed at B.'s request, a few days before the expiration of the tenancy, to forbear to remove the fixtures, B. agreeing to take them at a valuation; and A. at the expiration of his tenancy delivered up possession of the house to B. leaving the fixtures on the premises; the valuation having been afterwards made, it was held that indebitatus assumpsit was maintainable by A. for the price and value of fixtures bargained and sold, and for fixtures sold and delivered. That, it is submitted, goes the whole length of this case; if in that case an action was maintainable for fixtures sold and delivered, so it is here for a main engine sold and delivered.

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Dundas and Pashley, *contra*.—Perhaps, if this had been a count for *fixtures* sold and delivered, and an engine had been the subject-matter of sale, the action might have been maintainable. The word "engine" is a term well known in coal countries as applied to a machine which is used in a colliery to draw up the water from the mine. To make an engine is one thing, and to make and fix it is another.

(a) 6 Taunt. 322. (b) 4 M. & W. 687. (c) 1 C., M. & R. 266.

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The contract cannot be split into parts. An engine is one entire thing, which is not complete until it is fixed. Suppose the case of an Arnott stove—that no doubt might be the subject of a count for goods sold and delivered; but suppose the contract were for an Arnott stove to be *fixed* up, the contract in that case would not be completed until it were so fixed: and goods sold and delivered would not be maintainable. The proper form of action would be for work and materials. In *Tripp v. Armitage*, Parke, B., says in the course of the argument (a), “The contract is to make these several things *and* to put them up in the hotel, and then the bankrupt is to be paid one entire sum for the whole work. The contract therefore is not complete with reference to these sash frames, until they are fixed to the house and made part of the freehold.” And the Lord Chief Baron in giving his judgment says: “This is not a contract for the sale and purchase of goods as moveable chattels; it is a contract to make up materials and to fix them; and until they are fixed, by the nature of the contract, the property will not pass.” So here, the contract was not complete until all was done, and then it became a fixture. *Hallen v. Runder* only shews that fixtures which are removable by the tenant may be declared for as fixtures sold and delivered: but here this is not so declared for. This form of action cannot be maintainable, for it would be impossible to say what part of the price was for the constructing the engine, and what for the putting of it up. [Parke, B.—The question is, whether on a contract for a grate to be fixed and put up, the price agreed upon could be recovered under a count for goods sold and delivered?] That very point was decided in *Nutt v. Butler* (b). There the question was, whether the plaintiff could recover the value of grates and other fixtures under the count for goods sold and delivered; and Lord

(a) 4 M. & W. 693.

(b) 5 Esp. 176.

Ellenborough was of opinion that, being fixed to the freehold, and not a separate and undivided chattel, they could not come under the description of goods sold and delivered. In *Mucklow v. Mangles (a)*, it was held that the buyer of a chattel, ordered to be made for him, acquires no property in the chattel till it is finished and delivered to him, and therefore before then cannot maintain trover for it, though he has paid the price beforehand. In *Coombs v. Beaumont (b)*, it was held that a steam engine erected for the purpose of working a colliery did not come within the description of goods and chattels in the Bankrupt Act. Here, before the right of action could accrue, the engine is to be affixed to the freehold, and therefore could not be said to be delivered before that had taken place, and then it would no longer answer the description of goods or chattels. The contract would not be satisfied by a mere delivery of the engine, but it must be fixed.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKER, B.—In this case it appeared in evidence, that the plaintiff agreed to build a steam engine of one hundred horse power for pumping the defendants' colliery, to be completed and fixed for £2500. The engine was forwarded in parts, and fixed piecemeal at the colliery, and so made into an engine there, before the commencement of the action; and the question is, whether the plaintiff was entitled to recover on this executed contract, on a count in indebitatus assumpsit for a main engine, and other goods sold and delivered. We think he was not.

Whenever a simple contract is executed, and terminates in a debt, which it is the duty of the defendant to pay

(a) 1 Taunt. 218.

(b) 5 B. & Ad. 72; 2 Nev. & Man. 235.

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instantly, it is no doubt the subject of an *indebitatus* count; but the executed contract must be described properly: and the question here is, whether it is proper to describe this as a debt for a main engine or goods *sold and delivered*. We think not. The engine was not contracted for to be delivered, or delivered, as an engine, in its complete state, and afterwards affixed to the freehold;—there was no sale of it, as an entire chattel, and delivery in that character;—and therefore it could not be treated as an engine sold and delivered. Nor could the different parts of it which were used in the construction, and from time to time fixed to the freehold, and therefore became part of it, be deemed goods sold and delivered, for there was no contract for the sale of them as moveable goods; the contract was in effect that the plaintiff was to select materials, make them into parts of an engine, carry them to a particular place, and put them together, and fix part to the soil, and so convert them into a fixed engine on the land itself, so as to pump the water out of a mine. The cases of *Cotterell v. Apsey*, and *Tripp v. Armitage*, are authorities that materials used, or intended to be used, in the construction of a fixed building, cannot be deemed goods sold and delivered; and there is no difference between the erection of this sort of fixture and any other building. The proper form of count is in *indebitatus assumpsit*, for work, labour, and materials, or for erecting and constructing an engine.

In the course of the argument cases were suggested, where a contract for goods sold and delivered might be blended with one for labour; and it was asked whether a count for goods sold and delivered might not be maintained; as where a specific chattel was bought, and was to be carried to the house of the purchaser, for an entire sum. There the price of the commodity might be considered as enhanced by the delivery, and the debt properly described, as for the price of goods sold and delivered. If it were

part of the contract that the chattel purchased should be afterwards annexed to the freehold by the vendor, and for an entire sum, it might perhaps admit of a question whether that form of action alone would be proper. This it is unnecessary to decide: as also the question, whether the value of this steam engine might have been recovered in this form of action by the defendants, if they had been tenants of the land, and sold this on quitting as a removable fixture to the landlord or the incoming tenant.

The objection in this case is, that there was no contract of sale at all; but one for work and labour on the defendant's land, and materials used in the course of that work.

The rule must be absolute; but the plaintiff may amend on payment of costs of the amendment only; and it is to be regretted that an application was not made for the same purpose on the trial.

Rule absolute.

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BREMAN v. DUCK.

Feb. 25.

ASSUMPSIT on a bill of exchange for £175, stated in the declaration to have been drawn by certain persons, under the name, style, and firm of Bradshaw & Williams, upon the defendant, under the name or style of W. Serjeant, payable to the order of Bradshaw & Williams, at three months' date, accepted by the defendant, and indorsed by Bradshaw & Williams to the plaintiff. To this count the defendant pleaded, first, that the said persons therein mentioned did not draw the said bill as alleged; secondly,

A bill of exchange, purporting to be drawn by B. & W. (a really existing firm) payable to their order, and to be indorsed by them, was negotiated by the acceptor with that indorsement upon it. The drawing and in-

dorsement were forgeries:—*Held*, that if the bill was accepted, and negotiated by the acceptor, with knowledge of the forgery, he was estopped to deny the indorsement, as well as the drawing, by B. & W.: but *semble*, that where the name of a real party, as the drawer, is forged, a party who accepts the bill in ignorance of the forgery, is estopped to deny the drawing only, but not the indorsement, although in the same handwriting.

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that the said persons did not indorse it; and thirdly, that the defendant did not accept it: upon which issues were joined.

At the trial before *Wightman, J.*, at the last Bristol Assizes, it appeared that W. Serjeant, who was a partner of the defendant, brought the bill to one Johnson, a prior holder to the plaintiff, with the names of Bradshaw & Williams indorsed upon it, and negotiated it with him. The defendant alleged that the bill was accepted by Serjeant on account of a private transaction with him, and *malâ fide*. It was proved that Messrs. Bradshaw & Williams was a really existing firm, with which Serjeant had been accustomed to deal; and those persons being called, they swore that neither the drawing nor the indorsement of the bill was theirs; but stated also, that the handwriting of both was evidently the same. The learned Judge summed up the case to the jury with reference to the question which had been treated in the course of the trial as the principal point in dispute between the parties, viz. whether there was collusion or knowledge on the part of the plaintiff that the bill was made otherwise than for partnership purposes: and it was not until after the jury had given their verdict for the plaintiff, that his attention was called to the issue denying the indorsement, which it was alleged, on behalf of the defendant, was proved by the evidence of Bradshaw & Williams.

In Michaelmas Term, *Bompas, Serjt.*, obtained a rule nisi for a new trial, on the above ground, against which

Erle and Montague Smith shewed cause (Feb. 8).—The defendant, as acceptor of this bill, was clearly estopped from denying that Bradshaw & Williams *drew* it: and it being proved that the handwriting of the *indorsement* and of the drawing was the same, and the bill having been negotiated with that indorsement upon it by the acceptor, the

estoppel applies to the indorsement also, and the defendant is concluded from saying that it was not the signature of those persons: *Cooper v. Meyer* (a). Lord *Tenterden* there says: "The acceptor ought to know the handwriting of the drawer, and is therefore precluded from disputing it; but it is said that he may nevertheless dispute the indorsement. Where the drawer is a real person, he may do so; but if there is in reality no such person, I think the fair construction of the acceptor's undertaking is, that he will pay to the signature of the same person that signed the bill." Such is certainly the rule where the acceptance was prior to the indorsement, and the bill has been passed by the indorser: but where, as in this case, the acceptor himself puts the bill into circulation with the forged indorsement on it, he is equally estopped to dispute that indorsement. Having accepted a bill drawn by some person in the name of Bradshaw & Williams, without their authority, he undertakes to pay to the order of the same person: *Schuliz v. Astley* (b). If it were otherwise, the acceptor might be enabled to commit the grossest fraud, and yet escape liability. [*Parke, B.*—It was a question for the jury, according to *Cooper v. Meyer*, whether the bill was drawn in a false name. It was not left to the jury in this case whether the handwriting of the drawing and indorsement was the same.]

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Butt, contra.—There is a distinction between the case of a *fictitious* drawer, and that of the *forgery* of the name of a *real* person as drawer. It is in the former case only that the act of acceptance admits the indorsement. In the present case, the defendant was estopped to deny the indorsement as alleged by Bradshaw & Williams, and there was a distinct issue upon that. [*Parke, B.*—You say that *Cooper v. Meyer* applies only to the case of wholly fictitious

(a) 10 B. & Cr. 468; 5 Man. & Ry. 387.

(b) 2 Bing. N. C. 514; 2 Scott, 815.

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persons, who never could either draw or indorse; because there the acceptor admits that the bill is drawn by *somebody*—that is, by the same person who indorses in the same handwriting: but that here he agrees to pay to the order of Bradshaw & Williams, being estopped only to say that they did not draw the bill.] Yes. The defendant only undertook to pay to *their* indorsement, and until that is given the plaintiff has no title. The case is not like that of *Gibson v. Misset (a)*, where the acceptors were aware of the forgery; here, for aught that appears, the defendant may have been wholly ignorant that the signature of Bradshaw & Williams was not genuine; and that question was not submitted to the jury.

Cur. adv. vult.

The judgment of the Court was now pronounced by

PARKE, B.—The only question in this case was, whether the indorsement alleged in the declaration to have been made by Bradshaw & Williams was proved. It appears, that the issue raised by the traverse of the indorsement was not brought under the notice of the learned Judge who tried the case, until the jury had given their verdict upon the principal point in dispute, which the Court, on the application for a rule for new trial, refused to disturb; and the argument on shewing cause was confined to the question, whether the indorsement was proved by the evidence.

The bill was drawn in the name of Bradshaw & Williams, and indorsed in the same name, and there was some evidence of its being properly indorsed, as it was brought by the defendant's partner, with the indorsement upon it, to be discounted by a prior holder. On the part of the defendants it was shewn, that this firm was a real one,

(a) 1 H. Bl. 569.

and proved by both members of the firm, that the drawing and indorsement were forgeries.

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On the argument before us, it was contended by the plaintiff's counsel, that the drawing being a forgery, the defendant by his acceptance had undertaken to pay to any one who held the bill by an indorsement in the same handwriting, according to the principle laid down in *Cooper v. Meyer (a)*; and it was said there was evidence in the case, that the signatures in drawing and indorsing were those of the same person. If this were so, the rule ought to be made absolute for a new trial, as the question as to the identity of the signature has not been submitted to the jury.

But on the part of the defendant it is insisted, that the case of *Cooper v. Meyer* is distinguishable from the present, for there the drawers were fictitious; here they really existed, though their signature was forged; and that in such a case, the acceptor, though he admits that the bill was drawn by the parties by whom it purports to be drawn, does not admit the indorsement by the same parties; a doctrine which is clearly established, as to bills wherein the signature is not forged: *Robinson v. Yarrow (b)*. In analogy to that case, the defendant, it is said, admits by his acceptance that the bill was drawn in the name of Bradshaw & Williams, by themselves, or some agent authorized to draw in their name: but it does not admit that it was indorsed by themselves, or some agent authorized to *indorse*, which is a different species of authority. And we cannot help thinking there is great weight in that argument, if the defendant accepted the bill in ignorance of the forgery; but if he knew of it, and intended that the bill should be put into circulation by a forged indorsement, in the name of the same firm, by the same party who drew it, the case seems to fall within the principle of

(a) 10 B. & C. 468; 5 Man. & R. 387.

(b) 7 Taunt. 455.

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that of *Cooper v. Meyer*. Some doubt however occurs, whether the instrument ought not to be declared upon as payable *to bearer*, according to the case of *Gibson v. Minet* (a), as ultimately decided by the majority of Judges, and the House of Lords, and followed by the Court of King's Bench, in the case of *Bennett v. Farnell* (b). It may be remarked, that these cases were not cited, or this question raised, in *Cooper v. Meyer*.

There must therefore be a new trial.

Rule absolute.

(a) 1 H. Bl. 569.

(b) 1 Camp. 130, 180 c.

Feb. 25.

WILLIAMS v. MOOR.

An account stated by an infant is not absolutely void, but voidable only, and may be ratified by him after attaining his full age; and if he does so ratify it, an action of *debt* as well as *assumpsit* may be maintained thereon.

Quære, whether to a plea of infancy, the plaintiff ought to new assign the ratification as a new contract entered into after the party has obtained the capacity of contracting, or plead it by way of replication, as an act giving validity to an otherwise invalid contract.

DEBT for work and materials, for goods sold and delivered, for interest, and for money due on an account stated.

Plea, infancy.

Replication, that the defendant, before the commencement of the suit, to wit, on the 10th day of December, 1837, attained his full age of twenty-one years, and before the commencement of the suit, to wit, on the 27th September, 1839, in writing then signed by him, assented to and ratified and confirmed the said contract in the declaration mentioned, and then agreed to pay the plaintiff the said monies therein mentioned.—Verification.

To this replication the defendant demurred, on the following grounds, viz. that an action on an account stated did not lie against an infant; that the replication stated that the defendant was an infant at the time of stating the account, and that an infant, though he state an account, cannot be sued upon it; that an infant could not ratify such a contract after he came of age, or be liable in con-

sequence of such subsequent ratification on an account stated by him when he was a minor; that the action should have been brought in assumpsit, and not debt: that an infant is not liable for interest.

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Joinder in demurrer.

Erle (February 11) argued in support of the demurrer.—An infant cannot state an account, and if he do, it is absolutely void, and not voidable only, and it cannot form the consideration for a new promise. *Trueman v. Hurst* (a). It was there held that assumpsit on an account stated does not lie against an infant. Lord *Mansfield*, C. J., said, "An infant cannot bind himself by stating an account." And *Buller*, J., says, "A later case (b) than those which have been cited has been determined, which settles this case. There this Court were unanimously of opinion that an action would not lie on an account stated against an infant. The ground is this, the only consideration for the promise is the stating of the account; now if an infant cannot state an account, the consideration does not hold, and the promise is void." That is an authority to shew that the contract is altogether void. [*Parke*, B.—Is there any distinction between an account stated and a claim for goods sold and delivered, which were not necessities? An infant can ratify a debt for goods sold.] Yes; in the case of goods sold an infant may ratify, for he has received value originally: there would have been quid pro quo; and where he has received value, it is reasonable that he should be allowed to ratify. But where an account is stated, the consideration may have been valueless; or each party may have destroyed his vouchers, and have no means of knowing what was the real foundation for the demand. The authorities are collected in a note to *Harrison v. Fane* (c), and it

(a) 1 T. R. 40.

to that case, 1 T. R. 42.

(b) Alluding to *Bartlett v. Emery*, which is given in a note

(c) 1 Man. & Gr. 550, note (d).

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appears that the only mode by which an infant can account is before auditors appointed in a court of record, or by single bill, that is a bond without a penalty, to pay for necessities. In *Thornton v. Illingworth (a)*, where it was held that a promise made after the commencement of an action is not sufficient to sustain a replication that the defendant (who had pleaded infancy) ratified his contract after he came of age, *Bayley, J.*, says, "In the case of an infant, a contract made for goods for the purposes of trade is *absolutely void*, not voidable only." And *Holroyd, J.*, says, "Here no ground of action capable of being enforced in a court of law existed at the time when the action was brought; there was no foundation upon which the action could rest. The new promise was the sole ground of action, and not the revival of an old one." *Littledale, J.*, likewise says, "The contract of an infant under such circumstances as the present being void and not voidable, the promise in this case did not prove that any legal cause of action existed at the time when the action was commenced." [*Parke, B.*—*Holroyd, J.*, does not adopt the distinction taken by *Bayley, J.*, that a promise to pay for goods not necessities may be ratified, but that a promise to pay for goods purchased for the purposes of trade is void. The promise is not void in any case unless the infant chooses to plead his infancy.] In *Ingledeu v. Douglas (b)*, Lord *Ellenborough, C. J.*, held that an account stated by an infant is not evidence after he attains his age, even to shew that he has been supplied with the necessities mentioned in the account. That is in accordance with the opinions expressed by *Bayley, J.*, and *Littledale, J.*, in *Thornton v. Illingworth*. So in *Williamson v. Watts (c)*, Sir *James Mansfield, C. J.*, held that an infant could not accept a bill of exchange for necessities. And the reason given in the note to that case, why an infant cannot be bound by his signature to a negotiable bill or

(a) 2 B. & Cr. 824; 4 D. & R.
545.

(b) 2 Stark. N. P. C. 36.
(c) 1 Camp. 552.

note, is, because it not only admits the debt, but, if valid, would render him liable to an action at the suit of the indorsee, in which the amount of the original debt could not be disputed. [*Alderson*, B.—In the case of a negotiable bill or note, the ratification would be a promise which would not correspond with the declaration. Here the ratification would agree with the cause of action mentioned in the declaration.] The plaintiff ought to have declared in assumpsit, and not in debt. This form of action assumes that it was a complete debt during the minority. [*Alderson*, B.—Have you any authority that a bill of exchange cannot be ratified?] *Hunt v. Massey* (a) is the nearest case upon that point, and will perhaps be relied upon by the other side; but there the question whether the original instrument was not void was not raised, and the promise to pay the bill was made before it became due, which seems to be material: and it was therefore held that it would support a count on a promise to pay according to the tenor and effect of the bill. *Patteson*, J., there says, “If the defendant had pleaded infancy specially, the plaintiff might have replied that after he attained the age of twenty-one years, he assented to and ratified and confirmed the several promises in the declaration. And the letter would be good evidence to support that replication, for it is an order to the defendant’s agent to pay the very money for which he had given the bill.” And *Littledale*, J., says, “The case might be different, if the defendant had become of age, and written the letter after the bill had become due; then, perhaps, he could not be said to have promised to pay according to the tenor and effect of the bill.” *Hedgley v. Holt* (b) is another authority to shew that an infant is not bound by an account stated. Where there is proof of value having been received, it seems to be a voidable liability; but in the case of an account stated, there is no proof of the articles having been delivered. It is contended that even assumpsit is not

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(a) 5 B. & Ad. 902; 3 Nev. & M. 109.

(b) 4 Car. & P. 104.

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maintainable upon an account stated, but à fortiori an action of *debt* is not; for in debt the plaintiff would recover the debt, and there would be no opportunity of going into the items of the account. In *Oliver v. Woodruffe* (a), where a cognovit was given by an infant, the Court held it could not be supported, for three reasons—that an infant cannot appoint an attorney, that he cannot state an account *so as to bind himself*, and generally that he cannot do any act to prejudice his rights. [Parke, B.—The difficulty in my mind is to see the distinction between the case of a sale of goods which are not necessities, and that of an account stated. I cannot adopt the distinction of Mr. Justice Bayley.] If an action of debt be held to be maintainable upon an account stated, items clearly unsustainable may be comprehended, for the entire amount of the account stated would be recovered. And assuming that assumpsit might be maintained by reason of the subsequent ratification, an action of debt cannot; for the latter could only be maintained on the original account, which was insufficient. If it be not nudum pactum, the original claim ought to have been declared on.

Petersdorff, in support of the replication.—There is no such distinction as that which has been attempted to be taken with respect to contracts by an infant, as to some being void, and others voidable only. In every instance they are only voidable, and can only be made void by the infant electing to plead his incapacity. That is so even in the case of a bond; and the only reason why an infant cannot ratify such an instrument is that assigned in *Baylis v. Dineley* (b), namely, because it is an instrument under seal, and can only be confirmed by an instrument of as high a nature. It cannot be void where it depends upon contract. An account stated stands on the same ground as money lent or goods sold and delivered to an infant: and with respect

(a) 4 M. & W. 650.

(b) 3 M. & Selw. 477.

to money lent, it has been held that a promise to pay the latter after full age is good: *Ball v. Hesketh* (a). [*Alderson*, B.—And yet in Com. Dig. “Enfant” (C) 2, money lent is put as an instance of a void contract.] Yes; there is a constant confusion in the books between *void* and *voidable*, the words having been used indiscriminately. In *Thornton v. Illingworth*, which is one of the cases in which the contract of an infant is said to be void, and where the claim was for goods sold and delivered, it would seem that if the ratification had been before action, the plaintiff would have been held entitled to recover. It is impossible to distinguish contracts for money lent, goods sold not for trading purposes, and an account stated. [*Parke*, B.—In *Ball v. Hesketh*, it is stated to be a good consideration for a new promise. If that is the principle, ought you not to have new assigned the ratification?] It does not rest on the principle that it is a new promise, which raises a new contract by the ratification, but on the account stated itself, as affirmed by the ratification. A ratification by an infant does not supersede the original claim, but relates back and gives legal effect to it; it fixes the defendant with an obligation springing out of the old contract. *Hunt v. Massey* supports that view of the case. There the action was upon a bill accepted by the defendant whilst he was under age, and Lord *Denman*, C. J., observes that the letter written subsequently to his coming of age “amounted to a ratification of the original promise to pay according to the tenor and effect of the bill of exchange, and might be declared on accordingly.” And in *Cohen v. Armstrong* (b), where the replication was similar to the present, Lord *Ellenborough*, C. J., says, “Ratification and confirmation mean something more than merely repeating the promise; and the jury have found that the defendant has ratified. What does that mean? It surely means that he rendered valid what was before done; and how could that be except by a

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(a) Comberb. 381.

(b) 1 M. & Selw. 724.

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valid act, which act would have been invalid if he was then an infant. If the replication had alleged merely that he repeated the promise, it might have been different; but it alleges that he ratified." The ratification therefore is not a new or different contract, and could not have been newly assigned. In *Hartley v. Wharton (a)*, the declaration, in debt, contained counts for goods sold and delivered, and on an account stated, to which the defendant pleaded infancy, and the plaintiff replied that the defendant ratified the contract after coming of age. There no objection whatever was raised to the replication of a subsequent ratification, although the case was much contested in other respects. In *Ingledeu v. Douglas*, *Williamson v. Watson*, and *Hedgley v. Holt*, no attempt was made to shew a subsequent ratification, and therefore those cases are not in point. *Gibbs v. Merrill (b)* shews that a bill of exchange made by an infant is not void, for it was there held that a plea in abatement of the non-joinder of an infant, who was a co-acceptor, was good. Sir *James Mansfield*, C. J., in delivering the judgment in that case, says, "I never could understand the rule of law that an infant's contract was not void but voidable. The rule that he is liable for necessities is plain enough; but it does not seem in other cases in what manner he is to avoid his contract. He may do it, indeed, by plea, but it does not seem necessary that he should do any previous act to avoid it. It seems, however, that the contract is not void until the infant says that it is void." When the terms "void" and "voidable" are used, it is in truth merely a variation in phrase. As to the point that this action is in debt and not in assumpsit, and therefore it is misconceived, it is submitted that the ratification created a liability to pay a sum of money upon an account stated, and for that debt will lie. There is no difference in this respect between indebtedatus assumpsit and debt, because where one lies the

(a) 11 Ad. & Ell. 934, 3 Per. & D. 529.

(b) 3 Taunt. 307.

other does. The only question on the record is, whether there is any legal liability upon the infant to pay this claim, and the subsequent ratification removes the excuse set up by the defendant. There is no doubt that debt lies against an infant in other cases, where he has ratified the contract; and if this ratification be not void, it will equally well support this claim.

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Erle was heard in reply.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKER, B.—This was an action of debt on the common counts for work and materials, and for goods sold and delivered, with a count on an account stated.

Plea, that at the time of making the alleged contracts defendant was an infant. Replication, that, after defendant attained his age of twenty-one years, and before the commencement of the suit, he ratified and confirmed the said contract. To this replication there was a demurrer, on the ground that an account stated by an infant is absolutely void, and that no subsequent ratification of it after the infant has attained his age of twenty-one years will set it up, so as to enable the other party to the account to sue upon it. It is not necessary that we should decide what is the precise legal operation of the ratification by a party who has attained his age of twenty-one years, of a contract entered into during his minority; whether it is to be treated as an act giving validity to an otherwise invalid contract, or as a new contract voluntarily entered into after the party has obtained the capacity of contracting, the consideration being the moral duty arising from the previous transactions. The course of pleading in this case, following that which was adopted in *Cohen v. Armstrong* (a), *Thornton v. Illingworth* (b), and *Hartley v. Wharton* (c), (which last, like

(a) 1 M. & Selw. 724. (b) 2 B. & Cr. 824. (c) 9 Ad. & El. 934.

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the present, was an action of debt), would rather seem to indicate that the effect of ratification is to set up and give validity to the otherwise invalid contract—to remove the bar of infancy. On the other hand, that which is pointed out by the Court of King's Bench, in the above-mentioned case of *Cohen v. Armstrong*, as the old form of pleading, would lead to the inference that in such a case as the present the liability of the defendant arises wholly on a new contract, made after he has attained his age of twenty-one years. [See what was said by Lord *Mansfield* in *Hawkes v. Saunders* (a), and by Lord *Holt* in *Heyling v. Hastings* (b).]

Whichever form of pleading is adopted, and whatever be the precise legal nature of ratification, it is clear that on a declaration for goods sold and delivered only, without any count on an account stated, the ratification by the defendant after he has attained his majority will entitle the plaintiff to recover.

But the argument on behalf of the defendant was, that the case is different in an action on an account stated; for that an account stated by an infant is not merely voidable, but actually void, so that no subsequent ratification can make it of any avail. But we can see no sound or sensible distinction in this respect between the liability of an infant on an account stated, and his liability for goods sold and delivered, or on any other contract.

The contract of an infant for goods sold and delivered (not being necessities) is as completely void as his contract on an account stated, if by the word *void* is meant incapable of being enforced. The plea of infancy will be a bar to any demand on the one contract as well as on the other. But if by "*void*" is meant incapable of being *ratified*, then we can discover neither principle nor authority for the distinction relied on.

The principle on which the law allows a party who has attained his age of twenty-one years to give validity to con-

(a) Cowp. 290. (b) 1 Ld. Raym. 389; and see Comberbach, 381.

tracts entered into during his infancy is, that he is supposed to have acquired the power of deciding for himself, whether the transaction in question is one of a meritorious character, by which in good conscience he ought to be bound; and there seems nothing in the liability on an account stated to take that out of this general principle. It was indeed argued for the defendant, that on an account stated an infant derives no benefit; that he does not, as on a purchase of goods, get any thing valuable; that he has no quid pro quo. But this is a fallacy; an infant stating an account gets precisely the same benefit as an adult gets on a similar transaction. He makes certain the previously uncertain state of the transactions between himself and the person with whom he is stating accounts, and he gets rid of the necessity of preserving vouchers. This, in the case of an adult, is a sufficient consideration to create a debt; and we can discover no reason why it should not have the same effect in the case of an infant, supposing him to adopt and ratify it after he comes of age.

If an infant, having had dealings with an adult, meets and settles accounts with him during his infancy in the ordinary way, and a balance is struck and vouchers destroyed, he does that which certainly creates no legal liability on his part. But if on attaining his age of twenty-one years, he is satisfied of the fairness of the settlement, there seems to us to be just the same reason why he should be permitted to confirm that settlement, and render himself liable for the balance, as there is for enabling him to make himself liable on any other contract entered into during his infancy. The same principle applies as in the case of work and labour, or goods sold and delivered.

Neither do the cases cited by the defendant at all bear out his proposition. It is undoubtedly shewn very clearly, by the early authorities to which we were referred, that an infant cannot state an account so as to bind himself. But so neither can he render himself liable on any other contract not for necessities.

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The case of *Trueman v. Hurst* (a) was an action of assumpsit on an account stated—plea, infancy—replication, that the promises were for *necessaries*. The replication was held bad on demurrer, and on very satisfactory grounds; for an account stated cannot possibly be itself described as coming under the head of *necessaries*: and the question, whether the items of which the account consists be made up of necessaries, is by the very statement of account itself excluded from the view of the Court, although that is in truth on such a replication the only question to be decided. The Court therefore most properly held the replication bad. Exactly the same observation applies to the case of *Bartlett v. Emery*, referred to by Mr. Justice *Buller*, and mentioned in the note to *Trueman v. Hurst*. But in neither of those cases was the point raised, whether an account stated was void against an infant in any sense which would render it impossible for him to set it up by ratification after he came of age. The authorities referred to, therefore, certainly do not bear out the proposition of the defendant; and we have already stated that we do not think it rests on any sound principle of law.

The general doctrine is, that a party may, after he attains his age of twenty-one years, ratify and so make himself liable on contracts made during infancy. We think that, on principle unopposed by authority, this may be done on a contract arising on an account stated, as well as on any other contract. Judgment must therefore be for the plaintiff.

Judgment for the plaintiff.

His Lordship afterwards added,—“Whether this replication amounts in fact to a new assignment, or is improperly pleaded by way of replication, is not in question, as it is not pointed out as a ground of special demurrer.”

(a) 1 T. R. 40.

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IMRAY v. MAGNAY and Another.

CASE against the defendants as sheriff of Middlesex. The first count of the declaration stated, that the plaintiff had recovered a judgment against H. Gompertz for 236*l.* 12*s.*, and that the defendants, as sheriff of Middlesex, took in execution the goods of Gompertz under the fieri facias, but made a false return thereto of nulla bona. The second count stated, that there were goods of Gompertz, out of which the defendants might and ought to have levied the said sum of money, but that they neglected and refused so to do, and falsely returned nulla bona. The defendants pleaded, first, not guilty; secondly, to the first count, that they did not take in execution the goods of Gompertz; thirdly, to the same count, that they did not levy the money; fourthly, to the second count, that they the defendants could not nor ought to have levied the monies aforesaid, modo et formâ; fifthly, to the same count, that the defendants had no notice that they could levy on the goods of Gompertz. Issues thereon.

At the trial before Lord *Abinger*, C. B., at the Middlesex Sittings after last Trinity Term, it appeared that, at the time of the delivery of the plaintiff's writ to the defendants, the execution debtor, Gompertz, was in possession of property far exceeding in value the amount of the plaintiff's judgment; but it was alleged on behalf of the defendants that this property was not seizable under the plaintiff's writ, inasmuch as there were, before the delivery of that writ to the sheriff, other writs of fieri facias against Gompertz in their hands, and in particular a writ at the suit of one *Bebb*, for £3015. The plaintiff offered evidence in reply, to shew that *Bebb's* execution was fraudulent as between him and Gompertz. This evidence was objected to for the defendants, on the ground that the sheriff could not be affected thereby, unless it were shewn that he had notice

Where goods seized under a writ, founded upon a judgment fraudulent against creditors, remain in the hands of the sheriff, or are capable of being seized by him, he is compellable, under the stat. 13 Eliz. c. 5, to seize and sell such goods under a writ afterwards received by him, and founded on a bonâ fide debt: and if he neglect to do so, having notice of the fraud, and return nulla bona to the latter writ, he is liable to an action for a false return.

Therefore, evidence of the fraud in the previous judgment and execution is admissible in such action, in answer to a defence founded on the outstanding writ.

And the conduct of the debtor in reference to the execution of the previous judgment is admissible in evidence, as a part of the fraud.

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of the fraud. The Lord Chief Baron received the evidence, reserving the question for the opinion of the Court. For the purpose of proving the fraud, the plaintiff tendered evidence to the following effect:—Before the delivery of Bebb's writ to the sheriff in December, 1841, there had been in the sheriff's hands, since the previous January, a writ for £3000 at the suit of one Watson. On Bebb's writ being brought to the sheriff's office, they declined to execute it unless Watson's writ were withdrawn. Gompertz thereupon obtained from Watson an authority to withdraw it, which was done, and Gompertz's attorney paid the costs. It appeared also by the evidence of Mr. Taylor, the present plaintiff's attorney, that he had originally commenced the action against Gompertz at the suit of Watson, in January, 1841, at the request of Gompertz himself (a): that he declined, however, to proceed to judgment therein without Watson's authority, which Gompertz undertook to procure, and accordingly obtained and brought to Taylor a paper purporting to be written by Watson, authorizing Taylor to proceed in the action. It was shewn that this paper was really in the handwriting of one Wills, the brother-in-law of Gompertz. The other writs in the sheriff's hands, exclusively of Bebb's, were not of sufficient amount to cover the property in Gompertz's possession or to have prevented the defendants from executing the plaintiff's writ.

It was objected on behalf of the defendants, that the conduct of Gompertz in respect to the previous executions was not admissible against the sheriff: the learned Judge, however, received it. Some evidence was also given of favour shewn by the sheriff's officer to Bebb's execution, and of circumstances which tended to shew that he had notice of the fraud. It appeared also that, at the time of that execution, a claim was made by one Palmer to the goods,

(a) This piece of evidence was not specifically objected to.

and an issue under the Interpleader Act was directed between Palmer and Bebb, which, however, was never brought to trial. The jury found a verdict for the plaintiff, damages 289*l.* 12*s.*

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In Michaelmas Term, *Erle* obtained a rule nisi for a new trial, on the ground that the evidence objected to was improperly admitted. In the same term (Nov. 17),

Crowder, R. V. Richards, and *Montague Chambers* shewed cause.—The evidence of fraud in the previous execution was clearly admissible; and inasmuch as the conduct of Gompertz, in reference to Watson's execution, tended to the proof of the fraud, it was also properly received for that purpose. The circumstance of Watson's execution having remained in the hands of the sheriff for nearly a whole year was sufficient to put him upon inquiry with respect to it; and it was his duty to make such inquiry, which would at once have furnished him with ample evidence of the fraud: *Lovick v. Crowder* (a). In that case, as in the present, the evidence of the fraud arose out of the conduct of the execution creditor, in withholding the execution of his writ, and permitting the debtor to retain his credit over the goods. But further, there was in this case evidence to fix the officer with knowledge of, and even with participation in, the fraud; and the sheriff is answerable in this action for the acts of his officer: *Warmoll v. Young* (b). *Barber v. Mitchell* (c) is an express authority to shew that the question, whether the sheriff was a party to a fraudulent execution, may be tried in an action for a false return. In the proof of mala fides on the part of the sheriff, it is a necessary step to shew that the previous executions were fraudulent. *Lovick v. Crowder* is a distinct authority, that if the sheriff, by

(a) 8 B. & Cr. 132; 2 Man. & Ry. 84. (b) 5 B. & Cr. 660; 8 D. & R. 442. (c) 2 Dowl. P. C. 574.

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Erle and Kennedy, contra.—All that the plaintiff professed to do in this case was to shew that Bebb's *judgment* was fraudulent, and that the sheriff *had notice* thereof; and for that purpose the evidence was admitted. But it is submitted that that is not alone any answer to the defence of the sheriff, founded upon the existence of outstanding writs which cover the amount of the goods: he must be shewn to have been a *party to*, and accomplice in, the fraud. It is not enough that he has information of it, which he may believe or not. Here the writs originally came into the office without any knowledge on the part of the sheriff how the judgments were obtained, and it was his duty to execute them according to their priority: *Drewe v. Lanson* (a), *Wintle v. Freeman* (b). Ordinarily speaking, the sale enures to the satisfaction of the writ first delivered to the sheriff. This case is quite different from *Warmoll v. Young*, which was decided, on the authority of *Kempland v. Macauley* (c), upon the ground that the sheriff had been guilty of misconduct and partiality, in paying the proceeds of the levy to the first execution creditor, after the second creditor had expressly directed him to retain them. But mere delay in the execution of a writ does not of itself afford any evidence of fraud. In *Barber v. Mitchell, Patteson, J.*, expressed his opinion that a judgment could not be shewn to have been fraudulent as against creditors, in an action against the sheriff, unless it appeared that he was a *party to* the fraud. [*Parke, B.*—*Lovick v. Crowder* was the case of an execution delivered to the sheriff under circumstances of fraud.] Yes: it was delivered with a direction not to sell. The cases cited on

(a) 11 Ad. & E. 529; 3 P. & D. 245.

(b) 11 Ad. & E. 599; 1 G. & D. 93. (c) Peake's N. P. C. 65

the other side did not at all proceed upon the ground of fraud in *the judgment*. Unless the sheriff was a party to the concoction of the fraudulent judgment, the fraud *in it* is irrelevant. Then the conduct of Gompertz was not admissible in evidence: what he did with respect to Watson's execution afforded no proof that Bebb's was fraudulent.

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Cur. adv. vult.

PARKE, B.—The judgment of the Court was delayed in this case, for the purpose of considering whether the direction of the Lord Chief Baron, upon two questions which arose at the trial, was correct in point of law. It was an action brought by a judgment creditor against the sheriff, for neglecting to levy, and returning nulla bona. The defence was, that the goods proved to be in the possession of Gompertz, the original defendant, of the value of considerably more than £1000, were not seizable under the plaintiff's writ, because there were, before its delivery to the sheriff, five writs of fi. fa. in the hands of the sheriff, commanding him to levy a much larger amount. The answer to this case, on the part of the plaintiff, was, that part of those were withdrawn, and that the principal judgment and execution remaining were fraudulent against bonâ fide creditors; and if they were removed, there were goods enough to answer the plaintiff's debt. The plaintiff's counsel offered evidence of the fraud. The counsel for the defendant objected, that such evidence could not be received against the sheriff, unless the sheriff had notice of the fraud. The Lord Chief Baron admitted the evidence, reserving that point. This is the first point to be decided.

In order to shew that the judgments and executions were fraudulent, evidence was offered of the conduct of Gompertz with respect to a former execution. The principal writ of fi. fa., relied on by the defendants, was at the suit of one Bebb, for £3015, delivered to the sheriff

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on the 7th December, 1841. An execution was in the sheriff's hands from January, 1841, at the suit of one Watson, for £3000, and soon after Bebb's writ was brought to the sheriff's officer to be executed, he declined to do so, unless Watson's were withdrawn. Gompertz procured an authority from Watson to withdraw it, and Gompertz's attorney paid the costs. Watson's writ had been issued in the beginning of 1841 by a Mr. Taylor, in an action commenced by him at the request of Gompertz. Taylor would not proceed to judgment without Watson's authority, and Gompertz undertook to procure it. He produced a paper purporting to be written by Watson, and to authorize the proceedings. There was evidence that the paper, alleged to be in Watson's handwriting, was in that of a brother-in-law of Gompertz.

Mr. *Erle*, for the defendants, objected that the conduct of Gompertz generally on previous executions was not admissible in an action against the sheriff. And this is the second question which we have to decide.

If Bebb's execution is rejected, the others, being to the amount of about £800 and upwards, did not appear to cover the whole of the effects of which *prima facie* evidence was given.

The first objection made by Mr. *Erle*, we think, ought not to prevail. So far as it relates to the reception of evidence that the *executions* were fraudulent, that is, that they were delivered to the sheriff for the purpose of covering and protecting the property against other executions, and not for the purpose of being carried into effect by a levy, the cases are decisive that such evidence is admissible. An early case on this subject is that of *West v. Skip* (a), in which Lord *Hardwicke* lays down this proposition, that if a creditor by *fi. fa.* seize the goods of his debtor, and suffer them to remain long in the defendant's hands, and another

(a) 1 Ves. sen. 244.

creditor obtain a subsequent judgment and execution, it has been determined often that this is evidence of fraud in the first creditor, and the goods in the hands of the debtor remain lable. A similar doctrine was laid down in *Lovick v. Crowder* (a), where there had been a change of sheriff between the first execution and the second.

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But in this case evidence was received to impeach the *judgment itself* on the ground of fraud, and the question is whether evidence was admissible for that purpose.

Mr. *Erle* contended, on the trial, that the evidence was inadmissible without *notice* of the fraud to the sheriff. After my Lord had reserved this question, there was evidence given, at least of sufficient notice to put the sheriff on inquiry whether such fraud had been committed, for notice to a sheriff's officer to whom the execution of the plaintiff's writ was committed, after the delivery of the writ to him, was notice to the sheriff himself; and therefore the objection of Mr. *Erle* could not prevail.

He contended, however, on the motion before us, that notice was not enough, and the sheriff could not be liable, unless there was fraud, and the sheriff *was a party to it*. This point requires further consideration.

It appears to have been much doubted, whether, in an action against the sheriff, it could be shewn that a prior judgment was fraudulent against the plaintiff, a creditor seeking to enforce a subsequent execution; and the point has never been expressly decided, though there are dicta upon it. In *Warmoll v. Young* (b), the plaintiff sued the sheriff for not executing his writ of *fi. fa.* His defence was, that he had previously levied at the suit of one Knight; and the answer to that defence was, that Knight's judgment was fraudulent and void. Lord *Tenterden* received the evidence, on the authority of a decision of Lord *Kenyon's*, in the case of *Kempland v. Macauley* (c), having at first

(a) 8 B. & Cr. 132.

(b) 5 B. & Cr. 660.

(c) Peake, 65.

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thought it inadmissible; he reserved the point, however, for the consideration of the Court of King's Bench, which supported his Lordship's ruling, not on the ground that such evidence was in all cases admissible, for they declined to decide the general question, but because it appeared in that case, that the sheriff, after the sale, and after notice to retain the money given by the plaintiff, in order that he might move the Court, paid it over to Knight, without informing the plaintiff, and the Court held that he was thereby guilty of negligence, and, as Knight had no right to receive it, was responsible to the plaintiff for the amount; that he had lent his aid to one party, instead of standing indifferent, and must stand or fall by the rights of that party. On the narrow ground on which this case was decided, the admission of the evidence of fraud in the judgment obtained by Bebb may possibly be sustainable, as there was some evidence that the sheriff lent himself to Bebb, instead of standing indifferently between the parties.

It appears to us, however, that we ought to decide the general question, which is left in a doubtful state. The authority of Lord *Kenyon*, above referred to, turns out not to be conclusive. In the case before him, the sheriff was indemnified by the creditor, and, according to several cases, stood in the situation of the creditor, and might therefore impeach a judgment void against him for fraud. In a subsequent case, my Brother *Patteson* expressed an opinion on a motion before him, that the question, whether a judgment was fraudulent or not against creditors, could *not* be raised in an action against a sheriff, though it could if he were a party to the fraud: *Barber v. Mitchell* (a). On the other hand, in an action for a false return, Lord *Ellenborough* appears to have thought evidence admissible to impeach the judgment on which the action was founded,

(a) 2 Dowl. P. C. 577.

and to shew that it was fraudulent against creditors: *Tyler v. Duke of Leeds* (a); though the case itself does not appear to have been one in which the particular judgment could be impeached, as the defendant was not acting in enforcing the right of another creditor; and if no other creditor's execution intervenes, the judgment is certainly valid.

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In this state of the authorities, the question must be considered as doubtful, but the conclusion to which we have arrived is, that where there are goods seized under a former writ, founded on a judgment fraudulent against a creditor seeking to enforce a subsequent execution, and such goods remain in the hands of the sheriff, or are capable of being seized, the sheriff is compellable to seize and sell such goods under that subsequent execution; and this by virtue of the statute 13 Eliz. c. 5. [His Lordship read the second section of that statute.] The judgment is by the statute made void against *creditors*, but by implication it is void against a *sheriff*, who acts in right of a *creditor*; as a deed is, which is fraudulent against creditors: *Turvil v. Tipper* (c). And it is now of frequent occurrence, that the sheriff is bound to take goods which have been fraudulently conveyed or assigned to defeat creditors, and is responsible in an action for a false return at the suit of a creditor; and the statute seems to us to put both on the same footing. The creditor has no other way of avoiding the judgment, than by enforcing his execution for his debt, notwithstanding an execution upon it; or by application to the equitable jurisdiction of the Court to set it aside, which we apprehend has arisen in comparatively modern times; and whatever right the creditor had at the time of the statute, he has now.

If, indeed, the right of no creditor intervenes, the sheriff is bound to sell under a writ on a fraudulent judgment, for such judgment is good between the parties, and void only

(a) 2 Stark. 218.

(b) Latch. 222.

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against creditors : and if he sells under such a judgment to a bonâ fide purchaser, and not the fraudulent plaintiff himself, he cannot be compelled to re-seize the same goods, for the purchaser has a good title.

In the present case, a part of the goods seized under Bebb's writ was unsold. They were claimed by Palmer ; they had been in the possession of Gompertz before, and if Palmer's claim was untenable, (and the sheriff was clearly responsible for its validity), and the judgment at the suit of Bebb void against the plaintiff's execution, so that these goods could not be sold under it to the prejudice of the plaintiff's execution, the sheriff was liable to this action for not selling them. The remainder sold to Bebb was also seizable, as Bebb, on the hypothesis, was a party to the fraud against creditors ; and the sheriff was responsible for neglecting to seize and sell them, if he had notice of the fraud, or could have discovered it by reasonable inquiries ; and of this there was sufficient evidence for the jury.

We all therefore agree that the evidence was admissible. With respect to the second objection, that evidence of Gompertz's conduct in withdrawing Watson's execution, and originally causing it to be issued, was not admissible, we think, under the circumstances of this case, it was. The evidence of fraudulent conduct in former executions unconnected with this was not. The question being as to Bebb's judgment and execution being fraudulent, Gompertz's conduct in causing that to be executed was clearly admissible, to shew the fraud ; and his conduct also in causing Watson's to be withdrawn, in order that Bebb's should be executed, is a part of the same fraud. As to his conduct in originally causing Watson's writ to be issued, it may be doubtful whether that was admissible, but that point does not appear by my Lord's note to have been taken.

Rule discharged.

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UNWIN and Another, Assignees of HEATHCOTE and
LEVESLEY, Bankrupts, v. ST. QUINTIN.

Feb. 25.

TROVER by the plaintiffs, as assignees of George Heathcote and William Levesley, bankrupts, against the sheriff of Yorkshire.

Plea, that one George Heathcote and one William Levesley were, at the time of the issuing of the fiat, traders, and as such traders, to wit, on &c., became indebted to divers persons [naming them] in the sum of £200 and upwards; that the said George Heathcote and William Levesley being such traders and so indebted, afterwards, to wit, on &c., became and were bankrupts: and afterwards, and before the committing of the grievances &c., to wit, on the 9th August, 1842, one George Sampson and one William Sampson sued out a fieri facias against the said George Heathcote and William Levesley, [setting it forth], indorsed to levy 491*l.* 12*s.* 4*d.* and interest, which was delivered to the defendant, then being sheriff of Yorkshire, to be executed: and thereupon the defendant, being such sheriff, afterwards, and after the said George Heathcote and William Levesley became bankrupts as aforesaid, and before the issuing of the fiat, to wit, on the 10th of August, 1842, seized and took in execution

In trover by assignees of G. H. and W. L., bankrupts, against the sheriff, he pleaded, that one G. H. and one W. L. were traders, and indebted to divers persons in £200, and that they became bankrupts; that afterwards, G. S. and W. S. sued out a fi. fa. against the said G. H. and W. L., which was delivered to the defendant, as sheriff, to be executed; and thereupon the defendant, after the bankruptcy, and before the fiat, seized and took in execution the goods in the declaration mentioned, and before the fiat levied by sale thereof the monies men-

tioned in the writ: that the said goods were, immediately before the bankruptcy, the property of G. H. and W. L., and liable to be taken and sold under the writ. The plea then stated the issuing of the fiat, the adjudication, and the appointment of the plaintiffs as assignees, whereby they became, as such, entitled to the possession of the said goods as from the time when the said G. H. and W. L. became bankrupts, *which possession is the said possession of the plaintiffs as assignees in the declaration mentioned.* It then averred that the fi. fa. was bonâ fide executed and levied, without notice of a prior act of bankruptcy, that the judgment was not founded on a warrant of attorney or cognovit, and that the seizure under the writ was the conversion in the declaration mentioned:—*Held*, on special demurrer, that the plea was not bad as amounting to an argumentative plea of not possessed, inasmuch as it gave an implied colour, by admitting the right of the assignees, by relation, to the lawful possession of the goods at the time of the seizure under the fi. fa.

Held, also, that it sufficiently appeared from the whole plea, that the persons mentioned therein as having become bankrupts were the same persons as those mentioned in the declaration.

Held, also, that it was not necessary to aver that the execution was subsequent to the stat. 2 & 3 Vict. c. 29.

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the goods and chattels in the declaration mentioned, for the purpose of levying the said monies &c. ; and did afterwards, to wit, on &c., and before the issuing of the said fiat, by sale thereof levy the said sums of money, as by the said writ he was commanded : and the defendant says, that the said goods and chattels were, immediately before and at the time when the said George Heathcote and William Levesley became bankrupts as aforesaid, the property of the said George Heathcote and William Levesley, and liable to be taken and seized under and by virtue of the said writ.—The plea then stated the issuing of the fiat, the adjudication, and the appointment of the plaintiffs as assignees ; and that the plaintiffs then accepted the said appointment, and became and were assignees accordingly, and as such entitled to the possession of the said goods and chattels, as from the time when the said George Heathcote and William Levesley became and were bankrupts as aforesaid, *which possession is the said possession of the plaintiffs as assignees in the declaration mentioned.* The plea then averred, that the fi. fa. was bonâ fide executed and levied, that the goods were seized before the date and issuing of the fiat, and that the execution-creditors had not, at the time of executing and levying the writ, notice of any prior act of bankruptcy committed by Heathcote and Levesley, or either of them ; that the judgment was not founded upon any warrant of attorney or cognovit ; and that the seizing and taking of the goods under the writ was the conversion in the declaration mentioned.—Verification.

Special demurrer, assigning for causes (inter alia), that the plea amounted in effect to a denial that the plaintiffs ever were possessed of or entitled to the goods, or at all events to a denial that they were entitled to the possession of them as against the defendant ; that it did not state or confess a sufficiently colourable title in the plaintiffs to entitle them to maintain the action ; that it did not suffi-

ciently confess and avoid the matters alleged in the declaration; and that it contains no averment that the said George Heathcote and William Levesley mentioned in the plea were or are the same George Heathcote and William Levesley mentioned in the declaration, or at all events leaves it uncertain whether they are or not. Joinder in demurrer.

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The case was argued in Hilary Term (January 23), by

J. W. Smith in support of the demurrer. Having cited *Turquand v. Hawtrey* (a) as an authority to shew that the plea was bad, as amounting to an argumentative traverse of the plaintiffs' possession as assignees, the Court called upon

Pashley, in support of the plea.—In *Turquand v. Hawtrey*, the question as to the operation of the stat. 2 & 3 Vict. c. 29, in destroying the title of assignees of a bankrupt by relation to the act of bankruptcy, was not at all argued, and the Court in fact only intimated that it was an arguable question, which ought to be raised on the record. That is accordingly done in the present case. Now that relation is certainly not destroyed for all purposes. For example, a tort-feasor, who should damage a valuable chattel, e. g. a racehorse, belonging to the bankrupt, after the act of bankruptcy but before the fiat, would clearly be liable to the assignees, and they might in such a case declare upon their possession by relation. The question is, whether this plea is in form a good plea in confession and avoidance; and it is submitted that it sufficiently confesses that the plaintiffs were possessed of the goods in question, by the relation of their title to the act of bankruptcy. In *Pearson v. Rogers* (b), a plea was pleaded to an action of trover by an assignee, framed upon the 6 Geo. 4, c. 16, s. 81, and which was in substance similar to the present, and was held to be a good answer by way of confession and avoidance, and

(a) 9 M. & W. 727.

(b) 9 Ad. & E. 303; 1 P. & D. 302.

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therefore to be wrongly concluded by a special traverse of the assignee's title. Lord *Denman*, C. J., says, in delivering the judgment of the Court, "The plea admits the property in the goods to have been in the plaintiff by operation of law." [*Parke*, B.—It was not argued in that case that the plea was an argumentative traverse of the plaintiff's *possession*: the case was decided on the ground of its being a confession of a *conversion*. *Alderson*, B.—One does not see how you confess that a party is possessed, by stating facts to shew that he was *not* possessed. The law says, that as to these goods there is no relation, because they were seized and sold under particular circumstances. After they are so sold, and affected by that law, the assignees are appointed. Then as to them the law declares that the title by relation shall not exist.] The doctrine of relation was not intended to be interfered with by this statute, more than by the 6 Geo. 4, c. 16, s. 81, any further than was absolutely necessary. Its effect is, that the sheriff, having seized by virtue of process, is protected; and it is his duty to justify. The act says, not that the title of the assignees by relation shall be put an end to, but only that certain executions, &c. "shall be deemed to be valid." The plea of not possessed would not, if this view of the statute be correct, be a proper plea in this case. Where any special matter intervenes between the right of the plaintiff and that of the defendant, not possessed is a proper plea; as in *Gordon v. Harper* (a), *Owen v. Knight* (b), and *White v. Teale* (c): but where the right of possession and of property continues in the plaintiff up to the time of the conversion, not possessed is not a good plea. [*Parke*, B.—The effect of the stat. 2 & 3 Vict. c. 29, seems to be, that the moment the sheriff lays his hands upon the goods, under the circumstances therein mentioned, *he* is possessed.] The

(a) 7 T. R. 9.

(c) 12 Ad. & E. 106; 4 P. & D.

(b) 4 Bing. N. C. 54; 5 Scott, 307. 43.

sale is not alleged here as the conversion, but the *seizure*. *Esch. of Pleas, 1843.*
 The property must be in somebody in the interval; and it would seem that it must be in the assignees, in order to enable them to recover for any injury done to the goods. *UNWIN v. ST. QUINTIN.*
 [Alderson, B.—The property is changed in all the cases to which the relation can apply, but no further.] In *Weeding v. Aldrich (a)*, a plea, in trover for deer, that the defendant took them damage feasant in his own close, which was the conversion complained of, was held to have sufficiently confessed and avoided a conversion. [Parke, B.—There also the Court do not appear to have adverted to the question, whether the plea was an argumentative denial of the plaintiff's *possession*. The moment the sheriff lays his hands upon the goods to satisfy the execution, there is an end of the actual possession of the execution debtor, and, if the assignees are in possession by relation, of their possession also. Lord Abinger, C. B.—The bankrupts are dispossessed by operation of law before the alleged conversion. Alderson, B.—At the time of the seizure, the bankrupts were the only persons who ever had been actually in possession, nor was it certain there would ever be any other person possessed: then, *rebus sic stantibus*, the sheriff comes in, and fixes that state of things for ever. The assignees never have had possession, and under the circumstances never can have.]

But, secondly, even if the plea does amount to not possessed, it is good as giving the plaintiffs an *implied colour*, by admitting their possession by virtue of the relation: Stephen on Pleading, 206 (3rd edit.); 1 Chitty's Pleading, 527. A colour of title is sufficient, although it be a bad one: *Smith v. Adkins (b)*. Here the general property in the goods is admitted by the plea to have remained in the assignees till the time of sale. *Comyns v. Boyer (c)* is in

(a) 9 Ad. & E. 861; 1 P. & D. 657. (b) 8 M. & W. 370. (c) Cro. Eliz. 485.

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point, where it was held, that a plea justifying a trespass for taking the plaintiff's sheep, by a sale of the sheep by J. S. to the defendant in market overt, was held to be good in confession and avoidance, and to give sufficient colour. *Fancourt v. Bull* (a), *Rockwood v. Feasar* (b), and *Reeves v. Pepper* (c), are also authorities in favour of the defendant. Where a plea admits a cause of action in the plaintiff, although it contains matter which might be given in evidence under the general issue, it is a good plea in confession and avoidance: *Paramore v. Johnson* (d). So also, where matters of fact are intermixed with matter of law, the defendant may plead them specially: *Hussey v. Jacob* (e), *James v. Fowkes* (f), Com. Dig., Pleader, (E. 14, 15), *Pain v. Rochester* (g), *Carr v. Hinchliffe* (h). Here the plea, in truth, not only gives the plaintiffs colour, but an incontrovertible title, but for the facts subsequently stated. The same rule applies to *implied* as to *express* colour. This Court has lately permitted express colour to be given, in *Morant v. Sign* (i); and the same was done in *Marquis of Anglesey v. Lord Hatherton* (k). In both cases, the colourable title must be such "as might induce an unlearned person to imagine it sufficient, yet it must be, in legal strictness, inadequate to defeat the defendant's title, as shewn in the plea:" 1 Chitt. Pl. 531. It must be "matter of law," which does not lie in the knowledge of lay gens: Bac. Abr., Pleas & Pleading, (G. 3); Com. Dig., Pleader, (3 M. 41); *Radford v. Harbyn* (l). It might even be contended, on the authority of *Dr. Leyfield's case* (m), that colour need not be given here, inasmuch as the defendant "conveys to himself a title by act of Parliament."

(a) 1 Bing. N. C. 581.

(b) Cro. Eliz. 22.

(c) Skin. 362.

(d) 1 Ld. Raym. 566.

(e) Id. 87.

(f) Id. 89, n.

(g) Cro. Eliz. 871.

(h) 4 B. & C. 552.

(i) 2 M. & W. 95.

(k) 10 M. & W. 218.

(l) Cro. Jac. 122.

(m) 10 Rep. 90 b.

J. W. Smith, contra.—The plea is bad, as being an argumentative traverse of the allegation of the plaintiffs' possession as assignees; and no sufficient colour is given, whereby that objection is got rid of. It is immaterial that the *seizure* is the conversion complained of in the declaration; the sale would operate back upon the seizure. The defendant's argument is, that the plea confesses the possession of the plaintiffs, before the seizure, by relation to the act of bankruptcy: but that is a fallacy, for the assignees had not, as against the defendant, any possession either in fact or in law. It is clear they had no possession in fact; nor had they any in law, the effect of the stat. 2 & 3 Vict. c. 29, being rightly considered. As *Parke*, B., observes in *Tarquand v. Hawtrey* (a), how is the execution to be rendered valid, except by defeating the relation in cases of bonâ fide executions without notice? In *Hall v. Wallace* (b), the same learned Judge says—"The effect of the stat. 2 & 3 Vict. c. 29, is to destroy the relation of the title of the assignees to the act of bankruptcy, not only in cases where the transaction was more than two months before the fiat, but as to all bonâ fide transactions prior to the fiat." The defendant's argument is wholly inconsistent, also, with the deliberate judgment of this Court in *Whitmore v. Robertson* (c). It is said, supposing an injury done to the chattel before the sale, could not the assignees sue for that? No doubt, they would have the same right to do so as the bankrupt would have had. But the meaning of the plea of not possessed is, not that the assignees have no property at all, but that they have no property *as against the defendant*; and the effect of the statute is not to take away their property altogether, but only for the purpose of the protection of persons acting in the cases therein mentioned. The effect of the authorities cited on the other side is merely this—that matter of law may be

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(a) 9 M. & W. 729. (b) 7 M. & W. 357. (c) 8 M. & W. 463.

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pleaded specially, though it be inconsistent with the right alleged in the declaration: for instance, infancy or coverture may be pleaded specially, inasmuch as they admit a contract existing in fact, but not binding in law. There the defendant confesses the facts alleged by the plaintiff, but avoids them by matter of law; but here no fact is confessed, for the defendant shews that there was no possession in the assignees, either in fact or in law. *Pearson v. Rogers* is distinguishable. There the Court decided on the ground that the inducement of the plea confessed and avoided a conversion, and therefore the special traverse of property in the plaintiff was idle, and rendered the plea bad. [*Parke, B.*—Is not *Leyfield's case* an authority in favour of the plea? There the plea did not admit any title in the plaintiff at the time of the actual taking. So here the argument is, that the plea admits a general title in the assignees, which is consistent with the right of the sheriffs to work out the execution by the sale of the goods.] In *Leyfield's case*, the corn was admitted to be in the plaintiff's possession at the time of the taking: here the plea shews that there never was a possession in fact in the assignees, nor are they possessed in law, because their title by relation is destroyed by the statute of Victoria, which is in effect a repeal of the Bankrupt Acts as to these cases. There are many authorities to shew that the plea of not possessed, in trover, means, not entitled to the possession as against the defendant: *Gordon v. Harper* (a), *Owen v. Knight* (b), *Nicolls v. Bastard* (c), *Ashby v. Minnett* (d), *Butler v. Hobson* (e). *Rowe v. Ames* (f) shews that a plea is bad which amounts to an argumentative denial of any material allegation in the declaration.

Secondly, the plea is bad, on the ground that it does

(a) 7 T. R. 9.

P. 231.

(b) 4 Bing. N. C. 54.

(c) 4 Bing. N. C. 290.

(c) 2 C., M. & R. 659.

(f) 6 M. & W. 747.

(d) 8 Ad. & E. 121; 3 N. &

not identify the parties whom it alleges to have become bankrupts with the persons mentioned in the declaration. Com. Dig., Pleader, Certainty of Parties (C. 18). Thirdly, the defendant ought (the statute of which he seeks to avail himself being recent) to state that the execution issued after its passing: 1 Saund. 309 a, n. (5). It was so done in *Rowe v. Ames*.

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Pashley was then heard as to the last two points.—First, it is to be collected by necessary intendment from the plea, that the persons therein mentioned are the same as those mentioned in the declaration: because it is stated that the plaintiffs were appointed their assignees, and that their possession as such “is the possession of the plaintiffs as assignees in the declaration mentioned.” Secondly, the statute being in its terms general, it was not necessary to aver that the execution took place after its passing: that is matter of evidence. The rule suggested by Mr. Serjeant Williams, in the note to Saunders above referred to, rests on no sound principle. How is the line to be drawn, as matter of law, as between statutes which are or are not recent?

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—[His Lordship stated the pleadings, and continued]:—Three objections were taken to the special plea:—

First, and principally, that it amounted to an argumentative plea, that the plaintiffs were not possessed as assignees.

Secondly, that the persons described as traders and bankrupts in the plea are not averred to be the same with those in the declaration.

And, thirdly, (on general demurrer), that the execution.

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As to the first objection, it is clear that the defence insisted on in the plea might have been given in evidence on the one or the other of the two pleas, of not possessed, or not guilty. The question here, however, is not whether the defence was admissible under either of those two pleas, but whether it is bad on the ground that it is an argumentative plea of *not possessed* (whether it amounts to an argumentative denial of the conversion, is a question not raised by the special demurrer); and we think it does not, because there is in the plea an implied colour, as it admits the right of the assignees, by relation, to the lawful possession, at the time the defendant took possession of the goods under the fi. fa.; and the case resembles very closely that of a defence to an action of trespass, for taking tithe as rector, in *Leyfield's case* (a), in which case, the admitted possession of the plaintiff at the time of the taking gives sufficient colour. We think, therefore, that the principal objection must fail.

The second is answered by a reference to an allegation near the conclusion of the plea. The declaration states the plaintiffs to be assignees of George Heathcote and William Levesley. The plea begins by stating *one* G. H. and *one* William Levesley to be traders, &c., and in that respect is objectionable: but this is cured by the allegation that the plaintiffs were appointed assignees of the said George Heathcote and William Levesley, and became entitled to the possession of the goods, which possession is the said possession of the plaintiffs as assignees, *in the declaration mentioned*.

The third objection is, that the seizure is not averred to have been *subsequent* to the statute 2 & 3 Vict. c. 29. The answer is, that the statute is in its terms general, and

(a) 10 Coke, 88.

is not confined to seizures or to fiats subsequent to its passing: *Nelstrop v. Scarisbrick* (a), and *Moore v. Phillips* (b). If the fact had been that the assignees were appointed before the statute, it should have been replied, as in the last-mentioned case.

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We are of opinion, therefore, that the plea is good.

Judgment for the defendant.

(a) 6 M. & W. 684.

(b) 7 M. & W. 536.

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CASE for libel. The declaration, after the usual introductory allegation of the plaintiff's good character, stated, that whereas before and at the time of the committing of the grievance by the defendant as thereafter mentioned, the defendant used the word "black-sheep" for the purpose of expressing and meaning, and the said word used by him was by divers, to wit, all the persons to whom the libel thereafter mentioned was published, understood as expressing and meaning, a person notorious by reason of bad character, and of stained and sullied reputation; and the defendant then also used the word "black-legs," for the purpose of expressing and meaning, and the said last-

Declaration for libel averred, that before and at the time of the committing of the grievance by the defendant, the defendant used the word "black-sheep" for the purpose of expressing and meaning, and it was understood by the persons to whom the libel was addressed as expressing and meaning, a

Person notorious by reason of bad character, and of stained and sullied reputation: yet the defendant, intending to cause it to be believed that the plaintiff had conducted himself dishonestly and improperly, published of and concerning the plaintiff the libellous matter following:—"Black-sheep" (meaning thereby that the plaintiff was a black-sheep, in the sense and meaning in which the word was so used by the defendant). [The declaration then set forth a statement of facts respecting the plaintiff, no part of which was in itself libellous.] The defendant pleaded, as to the publishing of the following part of the supposed libel, that is to say, "black-sheep," that the defendant did not use that word for the purpose of expressing or meaning, nor was it understood by the persons in the declaration mentioned as expressing or meaning, a person notorious by reason of bad character, or of stained and sullied reputation: concluding to the country:—*Held*, on special demurrer, 1st, that the plea was well pleaded to that part only of the libel: 2ndly, that it was rightly pleaded as to the publishing of that part of the libel, and not to the inducement in the declaration as to that part: and, thirdly, that it was not bad as amounting to not guilty; the averment in the declaration, as to the word "black-sheep," being properly matter of *inducement*, which it was necessary to traverse specially.

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mentioned word so used by him was by divers persons, to wit, all the persons to whom the libel thereafter mentioned was published, understood as expressing and meaning, a person guilty of cheating and defrauding others: yet the defendant, intending to cause it to be suspected and believed that the plaintiff had conducted himself dishonestly, fraudulently, and improperly, on the 4th day of Sept., A. D. 1842, in a certain newspaper called *The Satirist*, or *Censor of the Times*, falsely and maliciously did publish, and cause and procure to be published, of and concerning the plaintiff, certain false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff, that is to say:—"Black-sheep" (meaning thereby that the plaintiff was a "black-sheep," in the sense and meaning in which that word was so used by the defendant as aforesaid) "and black-legs," (meaning thereby that the plaintiff was a black-legs, in the sense and meaning in which that word was so used by the defendant as aforesaid), "or sharps and flats:" [The declaration then set forth a statement of facts affecting the plaintiff, published by the defendant, no portion of which was in itself libellous]: by means of which premises the plaintiff was greatly injured in his credit and reputation aforesaid, and brought into public scandal, infamy, and disgrace, and had been otherwise injured, &c.

To this declaration the defendant pleaded, first, not guilty. Secondly, as to the publishing, and causing and procuring to be published, the following part of the said supposed libel, that is to say, "black-sheep," that before or at the time of committing of the said supposed grievance, he the said defendant did not use the said word, "black-sheep," for the purpose of expressing or meaning, nor was the same word, when used by him, by the said persons in the declaration mentioned, or any of them, understood as expressing or meaning, a person notorious by reason of bad character, and of stained and sullied reputation, in

manner and form as in the declaration alleged : concluding to the country. Thirdly, as to publishing, and causing and procuring to be published, the following part of the said supposed libel, that is to say, "black-legs," that before or at the time of the committing of the said supposed grievance, he the defendant did not use the said word "black-legs" for the purpose of expressing or meaning, nor was the same word, when used by him, by the same persons in that behalf mentioned, or by any of them, understood as expressing or meaning, a person guilty of cheating and defrauding others, in manner and form as in the declaration alleged : concluding to the country.

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There was also a fourth plea, justifying a portion of the statement, which was not in itself libellous.

The plaintiff demurred separately to each of the special pleas, assigning, as to the second plea, the following special causes of demurrer :—That the plea contained matter in answer to part only of the libel, and the part by the plea selected for such answer was not divisible from the rest of the libel ; that the defendant was not entitled to select only part of such a libel as that stated in the declaration, for the purpose of a defence thereto. That the plea, though in its commencement it professed to be an answer to part of the said causes of action, afterwards stated matter amounting to a defence to the whole of those causes. That the plea ought to have been pleaded to the inducement in the declaration, as to the said word "black-sheep," and not to the publishing of the part of the libel in respect of that word. That the plea amounted to the plea of not guilty, either to the whole or else to the part of the declaration mentioned in it ; and that it was an argumentative traverse of the defendant's being guilty of the grievance in the plea mentioned.

The causes of demurrer to the third plea were the same, substituting only the word "black-legs" for "black-sheep." To the fourth plea, special causes of demurrer

Exch. of Pleas, were also assigned, but that plea was given up on the
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The case was argued on the 10th of February, by

Martin, in support of the demurrer.—The same objections are applicable to the second and third pleas. First, they are bad as being pleaded to a part only of the libel. [*Parke*, B.—The Court of Common Pleas has expressly held that a defendant may so plead: *Clarkson v. Lawson* (a).] The propriety of that decision may be questioned. A libel is an entire thing, and cannot be split into parts in pleading. The plaintiff fails unless he proves the whole libel as alleged: it is not like the case of slander, where the plaintiff may recover on proof of so much only as is sufficient to sustain an action, and the rest of the statement in the declaration may be rejected. [*Alderson*, B.—Suppose a libel charges several distinct acts of cheating; may not the defendant justify as to some of them?] Perhaps he may, because there the allegations are separable in their nature; but here the different parts of the libel, to which the second and third pleas are pleaded, form one indivisible matter, the whole merely importing that the plaintiff is a person of stained and sullied reputation. *Clarkson v. Lawson* may be distinguished in the same manner: there the libel, stating that the plaintiff had been three times struck off the roll, included distinct and separable matters. In *Mounteney v. Watton* (b), it was held that the heading, “Horse-stealer,” to a libellous paragraph, which was alleged in the declaration to impute felony to the plaintiff, was not separable from the rest of the libel; and that a plea as to the latter, setting forth circumstances of suspicion against the plaintiff, was no answer. A person who inserts in a libel matter which he is unable to

(a) 6 Bing. 587; 4 M. & P. 356.

(b) 2 B. & Adol. 673.

justify may be considered as standing in the same situation as a trespasser *ab initio*. *Exch. of Pleas, 1843.*

Secondly, the pleas ought to have been addressed to the inducement in the declaration, as to the use of the words "black-sheep" and "black-legs." The averments in the inducement are either necessary or unnecessary: if necessary, the plea is a traverse of a material part of the declaration, and ought to have been specifically addressed to the inducement which contained it, so that the plaintiff might be informed what it was intended to answer; if unnecessary, then the traverse is bad as being immaterial.

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Lastly, the pleas are bad as amounting to not guilty. That plea puts in issue the publication of the libellous matter *in the sense imputed*, and under it the plaintiff is bound to prove the innuendoes. And the object of the inducement here is not, as in *Barham's case* (a), to introduce new facts, but merely to point the meaning of the words used in the libel, which is the proper office of an innuendo: and although it is in form inserted by way of inducement, yet not being necessarily introduced as such, it would not be admitted by the plea of not guilty: *Bennion v. Davison* (b). The pleas amount merely to an argumentative answer to the action, putting in issue the meaning of the words, and the fact of their being understood by the persons to whom they were addressed in the sense imputed, which would be included in the general traverse of not guilty: *Craft v. Boite* (c).

Hugh Hill, *contra*.—First, the subject-matter to which these pleas are pleaded being divisible, the defendant was entitled to plead separately to the separable parts of it. *Mouteney v. Watton* is quite distinguishable. There the gist of the libel, as imputing felony, was contained in the heading "Horse-stealer," and the plea not being pleaded to this

(a) 4 Rep. 20 a. (b) 3 M. & W. 179. (c) 1 Saund. 242, n.(1).

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heading, but confined to the facts of suspicion set forth in the paragraph itself, was held therefore to have admitted the innuendo, that the defendant meant to impute horse-stealing to the plaintiff, and so to be no justification. But both Lord *Tenterden*, C. J., and *Parke*, J., in their judgments in that case, expressly guard themselves against any inference that a defendant has not a right to justify a distinct part of a divisible libel. Suppose a plaintiff be truly charged with having been convicted of larceny, in a paragraph which contains other less injurious, but unfounded, allegations against him: is not the defendant to be at liberty to justify the charge of larceny separately; and is the plaintiff to come into Court and recover damages for the whole, as if he were a perfectly immaculate person? [*Alderson*, B.—One or other consequence must follow—either it may be given in evidence in mitigation of damages, or it may be pleaded to.] *Jones v. Stevens* (a) is an authority to shew that it could not be given in evidence in mitigation of damages. *Clarkson v. Lawson*, which expressly decided that part of a divisible libel may be pleaded to, is recognized in *Cooper v. Lawson* (b) and *Clarke v. Taylor* (c). *Stiles v. Nokes* (d) and *Lewis v. Clement* (e) confirm the same view. [*Alderson*, B.—In *Clarkson v. Lawson* the charge was, that the plaintiff had been three times struck off the roll. I should doubt very much whether such an allegation be divisible. If the statement were that he was struck off by Chief Justice A., by Chief Justice B., and by Chief Justice C., perhaps the defendant might separate the charges; but how can a defendant justify a statement that the plaintiff had been thrice struck off the rolls, by saying that he had been struck off once? The plaintiff's answer would be, "I never said you charged me with that." *Parke*, B.—In verbal slander, no doubt you may sever;

(a) 11 Price, 235.

(c) 2 Bing. N. C. 654; 3 Scott, 95.

(b) 8 Ad. & E. 746; 1 P. &
D. 15.

(d) 7 East, 493.

(e) 3 B. & Ald. 702.

but in action on a libel, which is a written document, the plaintiff must prove the whole under not guilty.]

Secondly, the proper mode of pleading was to address the matter so pleaded to that part of the cause of action to which it applied, and not to the inducement. The cause of action is the publication of the libellous matter to which the inducement relates, and without the inducement the declaration could not have been supported. The plea, therefore, properly denies the truth of that inducement, as to so much of the cause of action as it is pleaded to.

Lastly, the pleas do not amount to not guilty. The words "black-sheep," and "black-legs," are not words which in their natural sense impute anything injurious, and it is only by the aid of the introductory statement, of the peculiar sense in which they were used, that they can be made so: they required an inducement, therefore, and an innuendo alone would not have sufficed: *Goldstein v. Foss* (a), *Angle v. Alexander* (b), *Hearne v. Stowell* (c). The innuendo, therefore, being useless, may be rejected; but this being necessary *inducement*, the defendant was obliged, under the new rules, to traverse it specially, and it would not have been put in issue by not guilty.

Martin replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKER, B.—[Having stated the pleadings, his Lordship continued]:

Of the three pleas demurred to, the last was admitted to be bad.

The questions arising on the demurrer to the two other pleas are precisely the same as to each.

(a) 6 B. & Cr. 154; S. C. in error, 2 Y. & J. 146. (c) 12 Ad. & E. 719; 4 P. & D. 696.

(b) 7 Bing. 119; 4 M. & P. 870.

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The objections to the first special plea are three :

Firstly, that it is pleaded to *part* of the libel, which, it is insisted, is bad pleading.

Secondly, that it is not pleaded, as it ought to have been, to the inducement.

Thirdly, that it is an argumentative plea of not guilty, as to part of the declaration.

We think that none of these objections ought to prevail.

As to the first, we consider it to be settled, that there may be a plea to a part of a libel, which is separable from the rest, as the part pleaded to in this case certainly is, for a plea of justification as to this part, and not guilty as to the remainder, would not have been inconsistent; a part might be true, and the remainder excused by the occasion of the publication. The power of pleading to part was admitted by the Court in *Stiles v. Nokes* (a), and in *Clarkson v. Lawson* (b), it was decided that it was competent for the defendant to adopt such a course, where the libellous matter was divisible; and the principle of that decision was sanctioned by the Court of King's Bench, in *Mounteney v. Walton* (c); and this mode of pleading has become very common: *Goodburne v. Bowman* (d). The first objection, therefore, cannot succeed.

The second is, that the plea is pleaded, not to the inducement, but to the publication of the part of the libel to which the inducement relates. It seems to us that the plea is not improper in this respect. The cause of action is the publication of the libel; and the inducement, if properly pleaded (as we must assume it, for this purpose, to be), is necessary to maintain the action. The cause of action as to *part* of the libel, is the publication of *that part*; and the corresponding part of the inducement is necessary for the maintenance of the action, as to that

(a) 7 East, 506.

(b) 6 Bing. 587.

(c) 2 B. & Ad. 673.

(d) 9 Bing. 532; 2 M. & Scott, 700.

part. The defendant in his plea therefore says, as to so much of the cause of action as consists in publishing of the plaintiff that he was a black sheep, the inducement is not true, and therefore the cause of action pro tanto fails. This appears to us to be a correct manner of pleading.

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The third objection is, that the inducement, in this case, is not properly matter of inducement, and that the plea really amounts to the general issue. It is said that the proper office of an inducement, or introductory averment, is to state facts by reference to which the libel is rendered intelligible, and is shewn to contain an injurious imputation; but that the meaning of words, in the abstract and without reference to facts, is not properly the subject of introductory averment. And upon this part of the case we have had some doubt. It is laid down in several authorities, that the Court is to inform itself of the meaning of English words, though unusual, and peculiar to a particular country: a strong instance of which is the case in which the term "Healer of Thieves" was expounded to mean a furtherer of felons, without any averment as to the local use of those terms: 1 Roll. Abr. 86, L., pl. 1. And such is the rule as to Welsh words: Hob. 126. But the case of *Angle v. Alexander (a)*, in the analogous case of slander, decides that a distinct averment, that particular English words had acquired some sense different from their natural one, was necessary, and that an innuendo, without such averment, was insufficient; and on the authority of that case, which was decided in the Exchequer Chamber, and which it is clear the pleader has had in view in framing this declaration, we think that the averment of the meaning of the term "Black sheep" is properly introduced by way of inducement, and consequently the plea does not amount to not guilty. Under the new rules, the inducement, when properly pleaded, must be traversed, if

(a) 7 Bing. 123.

Exch. of Pleas, it is intended to deny it, and not guilty puts in issue only the publication of the libel maliciously, and in the *sensu* imputed in the innuendo.

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We therefore think the first special plea good; and the second special plea is in effect the same.

There will consequently be judgment for the defendant on the second and third pleas, and for the plaintiff on the fourth.

Martin then applied for and obtained leave to amend, on payment of costs as between attorney and client.



Feb. 25.

SUTHERLAND v. PRATT and Others.

Declaration on a policy of insurance stated, that the plaintiff caused a policy to be effected, purporting thereby and containing therein, that B. & Co., as well in their own names as in that

of all other parties interested, made assurance with the defendants for £2000 on goods (declared to be 360 bales of cotton), *lost or not lost*, at and from Bombay to London; and that in consideration thereof, and that the plaintiff paid the defendants the premium, and agreed to observe the terms and conditions of the policy, the defendants promised him that they would become assurers to the plaintiff of the said sum of £2000. The declaration then averred that the goods were shipped on the voyage; that the plaintiff was during the voyage, to wit, on &c., interested in the goods to the amount insured; that the assurance was made for the use and benefit and on the account of the plaintiff; that the ship sailed, and met with tempestuous weather, whereby the goods were wetted and damaged, and rendered of no use or value to the plaintiff:—*Held*, that a plea to this declaration, that the goods were so damaged before the plaintiff acquired any interest therein, was bad on general demurrer.

A party may make an insurance on goods, lost or not lost, though he have acquired his interest in them after a partial loss, unless he bought them with a knowledge of the damage.

A plea to the above declaration, that the policy was not caused to be made by or on behalf of the plaintiff, was held bad on special demurrer, as amounting to non assumpsit. So also was a plea that the plaintiff did not pay the premium, nor promise the defendants to observe the terms and conditions of the policy.

A defendant is not at liberty to traverse any single material fact, which would be included in the general issue.

The plea of non assumpsit puts in issue the consideration for the promise, as well as the promise itself.

assurance, and cause themselves and them and every of them to be assured with the General Maritime Assurance Company, *lost or not lost*, at and from Bombay to London, with leave to call at all ports and places on either side of and at the Cape of Good Hope, including the risk of craft to and from the vessel, upon any kind of goods and merchandise, and also upon the body, tackle, &c., of and in the ship, at ——— (a), and upon the said ship, &c. ——— (a), and so should continue and endure during her abode there, upon the said ship, &c.; and further, until the said ship, with all her tackle, &c., and goods and merchandise whatsoever, should be arrived at ——— (a); and upon the said ship, &c., until she had there moored at anchor twenty hours in good safety, and upon the said goods and merchandise until the same should be there discharged and safely landed. The insurance was declared to be on 860 bales of cotton, and the policy, after admitting the receipt of the premium, stated, that the said company were content, and did take upon them that assurance for the sum of £2000. —The declaration then alleged, that, in consideration of the premises, and that the plaintiff at the request of the defendants, (then being three of the directors of the said company), then paid to the said company the sum of £40 as a premium for the assurance of £2000 upon the said goods, on the said voyage in the policy mentioned, and then promised the defendants to perform and fulfil all things in the policy mentioned, on the behalf of the assured to be performed and fulfilled, the defendants then promised the plaintiff that the said company would become and be assurers to the plaintiff of the said sum of £2000, upon the said goods in the said ship in the policy mentioned, and would perform and fulfil all things therein mentioned on their part and behalf, as assurers of the said sum of £2000, to be performed and fulfilled: that the said

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(a) These blanks were left in the policy.

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goods, on the 1st of September, 1841, were shipped at Bombay on the said voyage: that the plaintiff was, *during the said voyage, to wit*, on the same day and year last aforesaid, interested in the said goods in the said policy mentioned, and so loaded on board the said ship, to the amount insured: that the said insurance was made for the use and benefit, and on the account of the plaintiff as aforesaid: that the said ship afterwards sailed on the said voyage, and being injured by tempestuous weather, became filled with water, whereby the said goods were wetted and damaged, and rendered of no use or value to the plaintiff.

The defendants pleaded eight pleas, of which the first was non assumpserunt. The second, after stating that true it was that the said policy of insurance, purporting and containing therein that Boggs, Taylor & Co., did make assurance of the matters and things according to the terms and provisions of the said policy, as in that behalf in the declaration mentioned and set forth, was made, to wit, upon the day and year in that behalf in the declaration alleged; yet the defendants said, that the said policy was not caused to be made *by or on behalf of the plaintiff*, in manner and form alleged: concluding to the country. The third plea alleged, that *the plaintiff* did not, nor did any person on his behalf, pay the said premium or any part thereof, nor promise the defendants to perform and fulfil the things in the said policy mentioned, on behalf of the assured to be performed and fulfilled, in manner and form alleged: concluding to the country. The eighth plea after stating, that although the said ship, with the said goods on board, departed and set sail upon the said voyage from Bombay to London, and although the said goods were damaged and diminished in use and value on the said voyage, as in the declaration mentioned; and although, after the commencement and during the course of the said voyage, and after the ship had sailed on the said voyage for divers, to wit, thirty-five days, and for divers,

to wit, 1000 miles, the plaintiff acquired an interest in the said goods, and then, to wit, on the 10th day of September, A.D. 1841, became and was interested in the said goods, to wit, to the value and amount in that behalf mentioned: nevertheless, that the said goods were so damaged and diminished in value, as in the declaration mentioned, *before* the plaintiff acquired or had any interest therein, to wit, upon the 20th day of August, A.D. 1841.—Verification.

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The plaintiff demurred specially to the second and third] pleas, on the ground that they amounted to the plea of non assumpsit, and that the matters alleged in them ought to have been given in evidence under the issue joined on that plea; and that the pleading in the manner as pleaded by the defendant in the second and third pleas tended to unnecessary prolixity and length. To the eighth plea the plaintiff demurred generally: and the point marked for argument on his part was, that the policy being effected "lost or not lost," the underwriters were responsible for the loss, notwithstanding it happened before the plaintiff acquired an interest in the goods.

Joinders in demurrer.

The case was argued in the present Sittings (Feb. 10), by

Martin, in support of the demurrer.—The only question of substance is that which arises on the demurrer to the eighth plea, viz. whether it is legal to enter into such a contract of insurance as is mentioned in that plea. This is the case of a policy on goods, *lost or not lost*, at and from Bombay to London, beginning the adventure from the loading of the goods on board the ship. The defendants, therefore, expressly contract to be responsible to the plaintiff, lost or not lost, from the loading of the goods at Bombay till their arrival and safe discharge in London. The plaintiff is admitted by the plea to have become interested in the goods *during the voyage*: and the de-

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defendants have engaged to become responsible to him for any loss sustained during the entire course of that voyage. By the express terms of their contract with the plaintiff, therefore, they engage to be responsible for this loss. Why are they not to be held to their contract? At the common law, a contract of insurance without any interest was legal: *Crawford v. Hunter* (a), confirmed by the Court of Exchequer Chamber in Ireland, in *British Insurance Co. v. Magee* (b). Is there, then, anything in the stat. 19 Geo. 2, c. 37, to affect this case? That statute enacts, "that no assurance shall be made on any British ship, or on any goods, merchandises, or effects, laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage." This is not a case where there is no proof of interest but the policy, nor is it a case of gaming or wagering. The plaintiff has the interest of a pledgee, and to protect himself against loss as such, effects the insurance: there is nothing illegal in that, either at common law or by the statute. He had the greatest possible interest in the arrival of the goods in the condition in which he supposed them to be when he made the advance upon them, so as to secure him from loss. *Mead v. Davison* (c) goes further than the present case. There the policy was in fact executed after the loss of the ship had become known to both parties, being made in pursuance of a contract entered into before the loss, and yet it was held valid: being assimilated to the case of a conveyance of land, where the house had been burnt down since the contract was made: *Paine v. Meller* (d). [*Parke, B.*—There the plaintiff was interested at the time of the loss: here he is not.] But the defendants have expressly contracted to indemnify him against that

(a) 8 T. R. 13.

(c) 3 Ad. & E. 303; 4 Nev. & M. 701.

(b) Cooke & Alcock, 182.

(d) 6 Ves. 349.

loss : and how can it be said that he effected the policy "interest or no interest," when he had the strongest possible interest that the goods should reach him undamaged. [Parke, B.—Your argument, I suppose, would be the same in case of a total loss.] There might be a difficulty there, because it might be said a person could not buy a thing which was lost : but here it is expressly stated to be a partial loss, and the goods exist in solido. [Parke, B.—It is not a wagering policy, because the plaintiff meant to insure against perils of the sea an interest which he would have had if the ship had arrived safe.] To render the contract illegal, it must be in the nature of a wager, and in no respect in the nature of an indemnity for a bona fide interest. [Parke, B.—*Stockdale v. Dunlop* (a) may be cited for the defendants : there, however, the plaintiff had no legal interest in the goods, because there was only a verbal contract.] This is a loss expressly protected by the terms of the contract, and the plaintiff has a sufficient interest.

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The second and third pleas are bad in form, as amounting to non assumpsit, which puts in issue the consideration given by the plaintiff for the defendants' promise, as well as the promise itself: *Bennion v. Davison* (b). To create a valid promise, it is essential to prove a consideration moving from the plaintiff. Here that consideration is the payment of a sum of money as a premium, which is admitted to have been paid by the plaintiff. These pleas in effect say—"You, the plaintiff, did not cause the policy to be made, and therefore I did not promise you." That clearly is an argumentative non assumpsit. It is said that the new rule of pleading in assumpsit, which states that in an action on a policy of insurance, the plea of non assumpsit shall operate as a denial "of the subscription to the alleged policy by the defendant, but not of the interest, of

(a) 6 M. & W. 224.

(b) 3 M. & W. 179.

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the commencement of the risk," &c., has rendered it necessary to plead this matter specially. But that is merely an example of the previous general rule, that the plea "shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged *may be implied by law*:" and the first example is, that in an action on a warranty, the plea will operate "as a denial of the fact of the warranty having been give *upon the alleged consideration*, but not of the breach." Surely, under non assumpsit, the plaintiff must prove that *he* bought the horse by himself or his agent. So, the instance of insurance clearly means, that the plea of non assumpsit shall deny the *making of the contract*, which involves the consideration for it, and also the fact that the plaintiff is the other party to it.

Greenwood, contrà.—The object of this declaration obviously is, to defeat the answer which the plaintiff knows the defendants would be able to give to any claim by Boggs, Taylor, & Co. The mode in which the interest is averred on this record is a mere evasion of the ordinary allegation of an interest during the risk and down to the time of the loss. The plaintiff could not apply the ordinary form here, because the loss occurred before he had any interest in the goods: he therefore uses an ambiguous expression, which may mean either that he was interested during the whole of the voyage, or that he had an interest on some particular day in the course of the voyage. In the latter sense the allegation is true, because on a day after the loss he was interested in the goods, in the state in which they then were, but *he* has therefore suffered no loss. The argument on the part of the plaintiff must be the same as in the case of a total loss. [*Parke*, B.—But there is an averment that the goods were wetted and damaged, and so became of no use or value *to the plaintiff*; that is, that *he* received damage by means of the loss.] Anybody might

say that, whosoever the goods were that were injured. If a party chooses to make such a contract by way of pledge, he may provide against loss by getting the owners to effect an insurance upon the goods, lost or not lost, and *they* may recover upon the policy as trustees for the pledgee. *Powles v. Innes* (a), *Sparkes v. Marshall* (b). Independently of the provisions of the statute against wagering policies, the language of the Courts has always been, that the plaintiff must be interested at the time of the loss. There is no such allegation here, nor any direct averment that he sustained any loss. [*Parke, B.*—Surely the averment I have referred to means, that by the perils of the seas a loss has been caused to the plaintiff, which would not be true if he bought the goods in their damaged state.] That is a mere superfluous statement, meaning in truth no more than the words at the end of the declaration, “to the damage of the plaintiff,” &c. If he proves the contract, the interest, and the damage, the right of action is complete; the rest is mere matter of evidence as to the *amount* of the damages. The allegation referred to could not have been traversed, and therefore nothing is admitted against the defendants by not putting it in issue. Could the plaintiff have recovered in case of a total loss? He has not lost anything. It is like the case of the sale in London of a particular horse, described as being “then on his voyage from Edinburgh,” but which is in fact dead at the time of the sale. Surely the purchaser could not be bound in such a case to pay the price, nor, if he had insured the horse, could have recovered on the policy: for there is an implied engagement in every contract for the sale of a specific chattel, that the thing is in existence; *Barr v. Gibson* (c); and a contract of insurance is only a contract of indemnity. *Rhind v. Wilkinson* (d) was the first case in which it was said to be unnecessary to aver an interest at the time of effecting the policy: but it

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(a) Ante, p. 10.

(c) 3 M. & W. 390.

(b) 2 Bing. N. C. 761; 3 Scott, 172.

(d) 2 Taunt. 237.

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clearly must exist during the risk. But when goods are lost or destroyed, whether in whole or in part, no risk exists. It can make no difference in principle whether the loss is total or partial. If I sell this year's crop of hay from a particular field, and it is then discovered that the stack was burnt down before the contract, the purchaser is not bound to pay; but if it has been damaged by weather or otherwise, still retaining, in common acceptance, the character of hay, then he must take it as he bought it, and pay the stipulated price. Can it make any difference whether the hay was in a stack or on board ship, or whether it was damaged by rain or sea water? If the purchase is after the injury, the purchaser takes the goods as he finds them; and if he insures them, however improvident the bargain he has made, inasmuch as *his* goods were not injured, the insurers can no more be liable to pay for the partial damage than they would in case of a total loss. [*Parke, B.*—You say that where goods are injured to a tenth part of their value it is the same thing as if that tenth did not exist.] Yes: as to that part there is an entire loss before the plaintiff has any interest in it. In case of the insurance of a house, it has always been necessary to show that the plaintiff had a property in it at the time of the fire: *Lynch v. Dalzell* (a). Lord King there says, "The party insuring must have a property at the time of the loss, or he can sustain no loss, and consequently can be entitled to no satisfaction." So, in *The Sadlers' Company v. Badcock* (b), Lord Hardwicke says, "I am of opinion it is necessary the party insured should have an interest or property at the time of insuring, and at the time the fire happens." And he observes, "These insurances from fire have been introduced in later times, and therefore differ from insurance of ships, because there *interest or no interest* is almost constantly inserted, and if not inserted you

(a) 3 Bro. P. C. 497.

(b) 2 Atk. 554.

cannot recover, unless you prove a property." That case occurred before the stat. 19 Geo. 2, c. 36, since which statute the distinction taken by Lord *Hardwicke* no longer exists. There is no case in which a party has been allowed to recover who had not an interest in the property at the time of the loss. *Mead v. Davison* is distinguishable: there the party had an interest at the time of the loss, under the antecedent contract. In *Grant v. Parkinson* (a), the insurance was on £1000, "being profits expected to arise from the cargo of the ship *Providence* in the event of her safe arrival at *Quebec*," and there was an allegation in the declaration that the plaintiff, "until and at the time of the misfortune hereinafter mentioned, was interested in the profits expected to arise from the said goods, &c. to a large value, &c." In *Atitbol v. Bristow* (b), an allegation of interest at the time of the loss is assumed by *Gibbs*, C. J., to be a necessary allegation. All the precedents contain such an allegation: see *Chitty on Pleading*, Vol. 2, pp. 105, 107. The ordinary plea, that the plaintiff was not interested in the goods at the time of the loss, would be altogether nugatory if the plaintiff be right, and the issue upon it would be immaterial. Besides, the contract of the insurer is merely to secure the assured against any loss the goods may sustain by perils of the seas: but here the plaintiff is no loser thereby, but by his having entered into an improvident contract with a third party. Surely it is too metaphysical and unnatural a construction to put upon the language of the parties to this policy, that because the plaintiff eventually suffers from having been a party to a contract, the subject-matter of which had previously been affected by the perils of the sea without his knowledge, his goods have been lost or damaged by these perils.

Secondly, the second plea is not bad as amounting to non assumpsit. Even if the matter traversed by it could

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(a) *Cited 3 Bos. & P. 85.*

(b) *6 Taunt. 464.*

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have been put in issue by non assumpsit, yet it is good, as being a simple denial of a material fact alleged in the declaration. And it is the far more convenient course so to plead, and thereby to save the opposite party the necessity of proving a number of unimportant facts, which are not disputed between the parties. This is not an averment of *new facts*, amounting to an argumentative general issue, but a mere denial of a single material fact specifically alleged in the declaration. The defendant has a right thus to *narrow* the general issue. In Gilbert's History of the Common Pleas, 60, it is said that "the pleadings in other actions were settled conformably to what was done in the assize, for they gave the defendant, if it were a matter of fact, the liberty of pleading the general issue, or traversing any material point of the declaration; but he could not plead a plea that amounted to the general issue, for pleas that amounted to the general issue were only facts on which the issue might be turned in evidence, and consequently not a good plea, because they drew to the examination of the Court what was proper to be determined by the jury; but they gave the defendant leave to traverse any material point in the plaintiff's declaration, in order to bring that one single point in issue, and to which they might apply their evidence alone." And the author proceeds to observe, "Therefore, in debt for rent, if it were by deed, they might plead non est factum; if it were without deed, non dimisit, or nothing in arrear, or that they never entered, unless it was by deed, and then they were estopped by their own acceptance;" and yet all these points were in issue under nil debet. In Stephen on Pleading, 418, (3rd edition), several instances are given in illustration of the rule that a plea setting forth matter which is constructively, and in effect, the same as the general issue, is bad. The first of them is cited from the Year Book, 10 Hen. 6, c. 16: it was an action for breaking the plaintiff's warren, and the plea was in this form—"Il n' ad

nul tiel garren. *Prest.*" This was held bad, but it may well have been because it concluded with a verification. Another instance is a plea of non depascit, to an action for breaking or entering a close and depasturing the grass; but there the plea was bad as being in form a plea to the whole action, whereas it only answered a part. Again, a plea, in an action for the price of a horse, that the defendant did not buy it, was held bad, because it put in issue every fact which could be put in issue by non assumpsit. And on reference to the authorities there cited, Vin. Abr., Certainty of Pleading, (E. 15), and Bro. Abr., Traverse, 275, other cases are found, in all of which some similar objection existed to the pleas. So in the cases cited in Com. Dig., Pleader, (E. 14), and Bac. Abr., Pleas and Pleading, (G. 2), either they amounted to an argumentative non assumpsit, or were open to the objection of prolixity. But no authority, ancient or modern, forbids a defendant to select a single material allegation, and simply to traverse it. The rule is only this, that the defendant shall not put any facts on the record, and verify them, the effect of which is to shew that no cause of action existed. Suppose an action for a wilful misrepresentation respecting a ship: not guilty would put in issue not merely the knowledge of the defendant, but also the state of the ship, and the making of the representation: the only ground of defence the party may wish to avail himself of may be his want of knowledge; yet he is to be compelled, if the plaintiff's argument be correct, to deny facts which he has no intention to dispute, and subject himself or his opponent to a large amount of unnecessary costs.

But even if this plea would have been bad at common law, it is rendered necessary by the new rules. It is observed in Chitty jun.'s Precedents of Pleading, 822, that, under the new rules, "non assumpsit would merely put in issue the question whether the defendants underwrote or granted the policy described in the declaration." And in

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De Pless v. Pollitt (a), where the declaration alleged that the plaintiff was the author of a musical composition, and as such author had a right to it, and in consideration of that right, and that the plaintiff would sell it to him, the defendant undertook to buy of him the said right, and to pay the price, *Tindal*, C. J., ruled that non assumpsit did not put in issue the authority or copyright, or that the plaintiff sold the production to the defendant. Under non assumpsit, therefore, the present plaintiff would have recovered merely on the production of a policy underwritten by the defendants, corresponding with that set forth in the declaration.

The same observations apply to the third plea. There is no authority that a defendant may not admit a nudum pactum, and traverse the considerations for his promise. The declaration in this case may import that the plaintiff entered into a substantive policy, independent of that entered into by Boggs, Taylor, & Co., but according to its terms. Suppose the promise so alleged to have been in writing, with a policy stamp, it would be a perfectly good contract; yet it is said the defendant is bound to leave the allegation unanswered. The promise to fulfil all things mentioned in the policy entered into with Boggs, Taylor, & Co., is just the same as if the defendants had promised to fulfil all things mentioned in a model policy hanging up in the office: it does not import that the action is brought on that policy. At all events, the effect of the new rules is to render it advisable to put such pleas on the record as these, which are mere denials of particular facts, and which would not make any difference in the proof at the trial.

Martin, in reply.—The rule is that a matter which is traversable by the plea of non assumpsit, shall be traversed thereby: and the cases cited on the other side all tend to establish that proposition. As to the case from the Year

Book, it is evident that the word "Prest" has not the meaning attributed to it, of a verification, for the reason assigned for the decision is that the plea was tantamount to the general issue, whereupon the defendant pleaded not guilty, and after that plea the very same word "Prest" occurs again. When a defendant denies that he promised, he denies the consideration moving from the plaintiff, and the promise thereupon made by the defendant. In the passage cited from Lord C. B. Gilbert, he may be referring to material averments not included within non assumpsit, as the interest, the loss, &c. *Gough v. Bryan* (a), where a plea to an action for negligent driving, that the damage was occasioned by the negligence of the plaintiff's servant, was held bad as amounting to not guilty, shews that the new rules have made no alteration in this matter, and that the defendant cannot select such facts as he pleases to traverse (b).

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As to the eighth plea, the cases cited from equity have no application: the words "lost or not lost" were not contained in the policies, and the interest had been transferred before the loss. The question here merely is, did the defendants contract to indemnify the plaintiff against a peril which in fact had already occurred, and was it lawful to do so? Now the terms of the contract are, that the plaintiff shall be indemnified against any loss the goods may sustain in the specified voyage. And the averment of interest is made necessary only by the statute, with reference to which this averment would be true: the plaintiff was interested in every particle of goods which left Bombay by this ship. It is enough to shew an interest sufficient to satisfy the statute, whenever existing.

Cur. adv. vult.

The judgment of the Court was now pronounced by

(a) 2 M. & W. 770.

Railway Co., 3 M. & W. 244; *Rowe*

(b) See also *Bridge v. Grand v. Ames*, 6 M. & W. 747.

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PARKE, B.—In this case the plaintiff declares in the usual form, that he caused to be made a policy of assurance, purporting thereby that Boggs, Taylor, & Co., as well in their own name, as for all persons to whom the same did, might, or should appertain, made assurance, and caused themselves and them to be assured with the General Maritime Assurance Company, *lost or not lost*, from Bombay to London, upon any kind of goods and merchandise, &c., beginning the adventure upon them from the loading thereof on board the ship until arrival, and the landing of the goods. The insurance was declared to be on 360 bales of cotton. The declaration then states, as usual, the admission in the policy that the premiums were paid, and in the usual manner, that, in consideration of the premises, and that the plaintiff, at the request of the defendants, being three of the directors of the company, paid them £40 as a premium for the assurance of £2000 on the goods, and then promised to fulfil all things in the policy on his part, the defendants promised the plaintiff that the Company would be assurers to the plaintiff of £2000 upon the goods, and would perform all on their part as assurers to be done, &c. The declaration then avers, that the goods were loaded at Bombay, to be carried on the voyage, and then (which is not in the usual form) that the plaintiff *was, during the voyage*, interested in the goods in the policy mentioned, and so loaded, to a large amount, to wit, the amount insured, and that the said assurance was made for his use and on his account. The ship is then stated to have been damaged by perils of the seas, and the goods thereby damaged, and rendered of no use to the plaintiff. The declaration then states, that the stock of the company was sufficient to make good the plaintiff's claim and demand which had so accrued, but that the defendants had not paid it, to the plaintiff's damage of £500.

To this declaration there were three pleas, which have been demurred to: the second, the third, and the eighth.

The second plea, after admitting that Boggs, Taylor, & Co., made the policy, denied that it was made by or on behalf of the plaintiff, and concluded to the country.

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To this there was a special demurrer, alleging for cause, that the plea amounted to non assumpsit.

The third plea averred, that the plaintiff did not pay the premium, nor did any one for him, nor promise the defendant to perform the things in the policy, on the part of the assured to be performed: concluding to the country.

To this plea also there was a special demurrer, for the same cause.

The eighth plea was, that although the plaintiff acquired an interest in the goods after the commencement of the voyage, to the amount insured, yet, that the goods were damaged and diminished in use and value, as in the declaration mentioned, before the plaintiff acquired or had any interest therein, and not after.

To this plea there was a general demurrer, which raises the only question on the merits of the case, the others being mere matter of form.

We are of opinion that the eighth plea contains no answer to the declaration. The plea admits expressly that the plaintiff had, during the voyage, an interest in the goods on board, to the amount insured thereon, and it admits impliedly, (for it does not deny that allegation), that the insurance was made for the use and benefit and on the account of the plaintiff, that is, as a contract of indemnity to the plaintiff, against any loss in respect of that interest, by any of the perils insured against. This being admitted, the simple question is, whether it is any answer to an action on a policy on goods, (*lost or not lost*), that the interest in them was not acquired until after the loss. We are of opinion that it is not. Such a policy is clearly a contract of indemnity against all *past*, as well as all *future* losses, sustained by the assured, in respect to the interest insured. It operates just in the same way as if

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the plaintiff having purchased goods at sea, the defendant, for a premium, had agreed, that if the goods had at the time of the purchase sustained any damage by perils of the sea, he would make it good. The plea, therefore, is bad in substance.

It was argued by Mr. *Greenwood*, that upon the pleadings it might be assumed that the plaintiff bought the goods in their damaged state, and consequently was not entitled to any indemnity for that damage. But it does not appear that he purchased them *as* damaged goods. If that had been true, he could not have recovered on this policy, on a plea denying the loss by the plaintiff by perils of the seas; and that would have been the proper form of plea to have raised this question.

It remains to consider the objections, which are formal, to the other two pleas.

To the second plea the objection is, that it amounts to the plea of non assumpsit. To this it is answered, that it does not amount to the general issue at common law, but is only a traverse of *part* of what would have been included in it, which is permitted: and, secondly, that if it was bad at common law, it was good by virtue of the first pleading rule in assumpsit.

We think this plea bad at common law. It is true, it does not resemble most of the pleas which amount to the general issue, which usually contain new matter, and conclude with a verification, and are bad as argumentative denials: but this is bad, on the ground that the law has provided an appropriate mode of denial of particular facts, which must be followed by the pleader, and that in order to avoid long records: *Warner v. Wainsford* (a). Thus, in trespass to a warren, it is a bad plea that there is no such warren; 10 Hen. 6, p. 16: to a close, non depavit herbas; Doct. Pl. 42; 22 Hen. 6, 37: to debt for the price of a

(a) Hob. 127.

horse sold, that the defendant did not buy; Vin. Abr., Certainty in Pleadings (A. 15): to which may be added the modern case of *Gough v. Bryan* (a), in which a special traverse of negligence, in an action on the case for negligence, was not permitted. This principle has been carried so far, that it has been held, where the general issue non assumpsit, or not guilty, denied all the facts alleged in the declaration, that it was not competent to traverse one: as, in assumpsit, to plead that defendant performed all on his part; *Taylor v. Sea* (b): in case for a false return, to plead that it was true; *Green v. Pope* (c): or to deny that at the emanation of the writ, the defendant was the officer to whom it was addressed; *West v. West* (d). On the other hand, where the general issue was not debt, and it embraced more than one distinct proposition, as where it was pleaded to an action of debt for rent, which accrues by the lease and subsequent enjoyment, it was allowed to the defendant to deny the indenture by non est factum; or the demise, if not by indenture, by "non demisit:" or to plead riens in arrere, as well as nil debet: Gilb. C. P. 61. It is not very easy to reconcile these cases, unless we suppose that non est factum, and non demisit, and riens in arrere, are formal modes of traverse as well as nil debet, and on that account permitted: but whether that be so or not, there is no authority for holding that each fact constituting one entire proposition, as that a valid contract was made between the plaintiff and defendant, can be made the subject of distinct traverses: and the plea in this case in effect is, that though there was a contract by the defendant, by the policy, it was not with the plaintiff: and this closely resembles the case, where to a bond, the defendant, admitting the execution of the bond, alleged that it was not made to the plaintiff, which was held to

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(a) 2 M. & W. 770.

(b) Ld. Raym. 968.

(c) Ld. Raym. 125.

(d) Id. 674.

Exch. of Pleas, amount to non est factum, and to be bad: *Gifford v. Perkins* (a).
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We are therefore of opinion that the second plea is bad at common law.

It is said, however, that, under the first pleading rule, the plea, non assumpsit, would not deny that the policy was procured to be made by or on behalf of the plaintiff, but simply the subscription to the policy, containing the terms stated in the declaration: and if so, the defendant might certainly traverse that it was caused to be made by or for the plaintiff.

But we are of opinion, that, according to the true construction of the pleading rules, non assumpsit puts in issue not merely the subscription to a policy, containing the particular terms alleged, but to a policy *caused to be made by the plaintiff*, and containing those terms; in the same way as non est factum would put in issue a bond *to the plaintiff*, in the case just cited. An action on a policy is mentioned in the pleading rules only as an example, illustrating the general rule previously given, the object of which is to confine the operation of the plea of non assumpsit, which had before operated as a denial of all the facts, and, indeed, of all liability to the action at the time it was brought, to a denial of the contract, expressed or implied, alleged in the declaration. A contract imports that there are two parties to it, and a denial of the contract alleged is a denial of a contract with the plaintiff.

Considering the example, therefore, as merely illustrating the rule, we think it clear that, in an action on a policy, the plea of non assumpsit denies that the defendant ever contracted by such a policy *with the plaintiff*, and consequently puts in issue the fact that the plaintiff caused the policy to be made. The second plea, therefore, is bad.

For the same reasons, the third also is bad. All the

facts put in issue are only facts of the proposition, that the defendant contracted with the plaintiff, and would be put in issue by non assumpsit.

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Leave to the defendant to amend, on the usual terms :
otherwise

Judgment for the plaintiff.

IN THE EXCHEQUER CHAMBER.

(*In Error from the Court of Exchequer.*)

—♦—
DRAKE and Others v. BECKHAM.

Feb. 6.

THIS was a writ of error upon the judgment of the Court of Exchequer in the case of *Beckham v. Drake and Others* (a), and was argued in last Trinity Vacation (b), by *E. V. Williams* for the plaintiffs in error, and by *Stammers* for the defendant in error. Two questions were raised; first, whether the cause of action mentioned in the declaration passed to the assignees of the plaintiff below, on his bankruptcy; and secondly, whether the action was maintainable against all the three defendants below, two of them only having signed the written contract with the plaintiff. On both these points the arguments were in

A. agreed in writing with B. and C., on behalf of themselves and D., as partners in trade, to serve them, B. and C., and the survivor of them, for seven years, as their foreman, and not to engage in trade on his own account during that period without their consent; and B. and C.

agreed to pay him wages after the rate of 3*l.* 3*s.* per week, so long as he should serve them faithfully:—*Held*, in the Exchequer Chamber, (reversing the judgment of the Court of Exchequer), that the right of action for a breach of this agreement, by the dismissal of A. from the service without reasonable cause, passed to the assignees of A. on his bankruptcy, as being part of his personal estate, whereof a profit might be made.

Held, also, (affirming the judgment of the Court below), that the action was maintainable against B., C., and D. jointly, though B. and C. only were parties to the written agreement.

(a) 8 M. & W. 846; 9 M. & W. 79.

(b) June 27, 1842, before Lord Denman, C. J., Tindal, C. J., Pat-

teson, J., Williams, J., Coleridge, J., Collman, J., Maule, J., and Cresswell, J.

Exch. Chamber, substance the same as in the Court below. *Crofton v. Poole (a)* and *Hillary v. Morris (b)* were cited for the plaintiffs in error, in addition to the cases mentioned in the Court of Exchequer.

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The Court took time to consider, and their judgment was now delivered by

LORD DENMAN, C. J.—This was an action of assumpsit on a special agreement. The declaration alleged, that the three defendants were in partnership as type founders; that Knight and Surgey were the ostensible partners, and Drake a secret partner; that Knight and Surgey, on behalf of themselves and Drake as such partners, entered into an agreement with the plaintiff, whereby they agreed to employ him as their foreman for seven years, at the wages of three guineas a week; that he served them in that capacity part of the term, and was willing to serve during the residue, but the defendants, on &c., before the expiration of the seven years, dismissed him from their service.

The defendants Drake and Surgey pleaded, amongst other things, the bankruptcy of the plaintiff, and that the cause of action in the declaration mentioned accrued before the bankruptcy. Knight suffered judgment by default.

To this plea the plaintiff demurred, and on that demurrer judgment was given in the Court below for the plaintiff: whereupon the defendants brought a writ of error, which was argued before us after last Trinity Term.

On the argument of the case, two questions were raised for our consideration. First, whether the right of action in respect of the breach of contract laid in the declaration passed to the assignees of the bankrupt, for the benefit of his creditors, or remained in him: and secondly, whether

(a) 1 B. & Adol. 568.

(b) 5 C. & P. 6.

the bankrupt, if entitled to sue for the breach of contract, could maintain his action against the three defendants. Upon this latter point it may suffice to say, that as the contract, although in writing, was not under seal, we must construe it by the rest of the averment, that it was made on behalf of Drake as well as the two partners who signed it, and therefore all the three partners were properly made defendants in an action for the breach of it.

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The other question is attended with more difficulty. According to the general scope and spirit of the bankrupt laws, as Lord Chief Justice *Eyre* expresses it in *Smith v. Coffin* (a), "every beneficial interest which the bankrupt has shall be disposed for the benefit of his creditors;" and *Buller, J.*, in the same case said, "The object of the statutes of bankrupt was, that everything belonging to the bankrupt that can be turned into profit, shall pass by the assignment for the benefit of the creditors:" and they held accordingly, that the right to bring a real action passed to the assignees of a bankrupt. So, in *Wright v. Fairfield* (b), Lord *Tenterden* said, that the object of the statute 6 Geo. 4, c. 16, was to give to the assignees, for the benefit of the creditors, every beneficial matter belonging to the bankrupt's estate; and it was held by the Court, that the right to sue for a breach of a contract to supply stones, which right accrued before the bankruptcy, passed to the assignees; nor was it considered to be any objection that the damages were unliquidated. Lord *Tenterden* considered that the right of action was part of the bankrupt's personal estate. Again, in *Raymond v. Fitch* (c), Lord *Abinger*, in giving the judgment of the Court, said that "the personal representative may sue, not only for all debts due to the deceased by specialty or otherwise, but for all covenants, and indeed for all contracts with his testator, broken in his lifetime; and the reason appears to be that

(a) 2 H. Bl. 451.

(b) 2 B. & Adol. 727.

(c) 2 C., M., & R. 588.

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these are choses in action, *and are parcel of the personal estate*, in respect of which the executor represents the person of the testator, and is in law the testator's assignee." An executor may represent his testator more perfectly than an assignee represents the bankrupt, but all the personal estate of the bankrupt, which can be turned to profit, vests in the assignee: and this case recognises rights of action as parcel of the personal estate, and they may be turned to profit; the assignee, therefore, as a general rule, takes them under the assignment. Many other cases might be quoted, in which the same rule has been recognised.

But it was argued that there were several exceptions to that rule, and that this case falls within one or the other of those exceptions. One exception stated was, that the assignees cannot recover in respect of the personal labour of the bankrupt; for which *Chippendale v. Tomlinson* (a) was cited; but that case related to the labour of the bankrupt bestowed after the assignment, and would be manifestly inapplicable to a claim for the wages of labour which accrued due before the bankruptcy; and it appears to be quite as inapplicable to a right of action in respect of a breach of contract, vested in the bankrupt before his bankruptcy, although that contract related to his personal labour.

The counsel for the defendants in error then relied upon another class of cases, in which it has been held that contracts for the personal skill of a bankrupt do not pass to his assignees: but they also are inapplicable, for it is not necessary that the plaintiffs in error should contend that the *contract* passed to the assignees; it suffices if they can shew that the right of action, vested in the bankrupt before his bankruptcy, passed by the assignment. But it was further argued, that, as this contract related to the person of the bankrupt, the right of action would not pass.

(a) Cooke's Bankrupt Law, 106.

There is no doubt that a right of action for an injury to the body or feelings of a trader, arising from a tort, independent of contract, does not pass to his assignees ; ex. gr. for an assault and battery, or for slander, or for the seduction of a child or servant ; and the same may be said of some personal injuries arising out of breaches of contracts, such as contracts to cure or to marry ; and if, in the cases last supposed, a consequential damage to the personal estate follows from the injury to the person, that may be so dependent upon and inseparable from the personal injury, which is the primary cause of action, that no right to maintain a separate action in respect of such consequential damage will pass to the assignees of a bankrupt. In all those cases the primary cause of action, if of a nature, properly speaking, personal, and the right to maintain it, would die with the bankrupt. In the present case, although the contract was for the personal skill and labour of the bankrupt, the breach of that contract does not appear to cause him any other injury than the diminution of his personal estate. In the cases referred to, the injury (if any) to the personal estate is a consequence of an injury to the person ; in this case the injury to the person (if any) is a consequence of the injury to the personal estate. The injury to the personal estate is therefore in this case the primary and substantial cause of action : and we think that, according to the authorities, such right of action would pass to the assignees as part of the personal estate, it being a matter belonging to the bankrupt, whereof profit may be made.

For these reasons, it appears to us that the judgment of the Court below must be reversed.

Judgment reversed.

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Held, by the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that where a claim of a modus or other exemption from tithe is preferred before the Tithe Commissioners, appointed under 6 & 7 Will. 4, c. 71, who decide against the claim set up, the party is not precluded from setting up another claim to a different modus on the same lands, unless the commissioners have made their final award under the act; even though a feigned issue, delivered under the 46th section, be pending to try the validity of the first modus.

BARKER v. The TITHE COMMISSIONERS for ENGLAND and WALES, and WYRLEY BIRCH, Esq.

A WRIT of error having been brought on the judgment of the Court of Exchequer in this case (a), it was argued in the Vacation after last Trinity Term (June 27 (b)), by *R. V. Richards* for the plaintiff, and *Kelly* for the defendant, Mr Birch. The *Solicitor-General* appeared for the Tithe Commissioners, but was not called upon to argue.

The Court took time to consider their judgment, which was now delivered by

LORD DENMAN, C. J.—The question in this case is, whether the Tithe Commissioners, appointed for England and Wales under the 6 & 7 Will. 4, c. 71, have power to hear and determine a question relative to the existence of a modus of 6s., claimed in respect of certain land, having previously heard and decided against the existence of a modus of 6s. 8d. claimed in respect of the same land, which second claim was set up and preferred before they had made their final award, and while an action on a feigned issue, directed under the 46th section of the act to try the validity of the first-mentioned modus, was pending. The 45th section of this statute enacts, that “if any suit shall be pending touching the right to any tithes, or if there shall be any question as to the existence of any modus or composition real, or prescriptive or customary payment, or any claim of exemption from, or non-liability under any circumstances to, the payment of any tithes in respect of any lands, or any kind of produce, or touching the situation or boundary of any lands, or if any difference shall arise, whereby the making of any such award

(a) 9 M. & W. 129.

J., Williams, J., Coleridge, J.,

(b) Before Lord Denman, *Collman, J., and Maule, J.*

C. J., Tindal, C. J., Patteson,

by the commissioners or assistant-commissioner shall be hindered, it shall be lawful for the commissioners or assistant-commissioner to appoint a time and place in or near the parish for hearing and determining the same, and the decision of the commissioners or assistant-commissioner shall be final and conclusive on all persons subject to the provisions hereinafter contained." The 46th section gives a power to all persons dissatisfied with the decision of the commissioners, where the yearly value of payment to be made or withholden shall exceed £20, to try the right by a feigned issue, and the 66th section makes the final award of the commissioners binding on all persons and in all cases. The object of the legislature, when they passed this statute, was to give the commissioners power to determine all questions relative to moduses and other similar matters, so as to prevent all litigation after an award should once be made. Now, as at the common law it is competent to a party to put forth different claims in succession, so under this statute, until the door of all litigation is shut by the award, the party interested ought to be allowed to set up any second claim he may think himself entitled to set up, after having been defeated by evidence or otherwise on the first, and it would require strong language to convince us that he is precluded from so doing. There is nothing in the 45th or any other section of the act to lead to any other conclusion. The concluding words of the 45th section are indeed relied on for this purpose, by which it is said that "the decision of the commissioners shall be final and conclusive;" but it is plain these words only mean the particular matters in question,—that the decision of the commissioners shall be conclusive upon them, and cannot fairly be construed to prevent other questions being raised. If a party abuses this privilege, he will suffer by being mulcted in the costs, but even if he were not, it would not be a sufficient ground to shake the jurisdiction of the commissioners. Then, however, it

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is said that the commissioners cannot exercise this power while an action is pending to try the validity of the former modus; perhaps (it is argued) the first modus of 6s. 8d. will be established by the verdict of a jury, and if the commissioners in the mean time should decide in favour of the new claim of a modus of 6s. there would be a conflict of decisions.

The answer to this objection however is, that the commissioners have a discretion vested in them as to the time at which they will hear claims of this nature, so that they can postpone the hearing of this particular one until the action shall be disposed of; but their jurisdiction to hear is not affected by this. On the whole, we agree in the construction put on this statute by the Court below, whose judgment therefore must be affirmed.

Judgment affirmed.

MEMORANDUM.

IN this Vacation, *Nathaniel Richard Clarke*, of the Middle Temple, Esq., and *John Barnard Byles*, of the Inner Temple, Esq., were called to the degree of the coif, and gave rings, the former with the motto "*Sapiens qui assiduus*," and the latter with the motto "*Metuis secundus*."

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

EASTER TERM, 6 VICT.

FOWLER v. JAMES and ELIZABETH CHURCHILL, and P. CHURCHILL, S. CHURCHILL, and C. CHURCHILL v. The GOVERNOR and COMPANY of the Bank of England. *Exch. of Pleas, 1843.*

April 19.

AN order had been made by *Parke*, B., under the 1 & 2 Vict. c. 110, ss. 14, 15, that the dividends due upon the sum of £5000, new 3½ per cent. government stock, standing in the Bank books in trust for Elizabeth Churchill, should stand charged with the payment of a judgment debt of £213 10s., and that until that order should be

A., being possessed of 12,058l. 6s. 8d. new three and a half per cent. stock, bequeathed to E. C. a certain interest in £5000, parcel thereof.

A judgment having been obtained against E. C., the judgment creditor obtained a Judge's order under 1 & 2 Vict. c. 110, ss. 14 and 15, charging this latter sum with the judgment debt, which upon cause shewn was made absolute as to so much of the dividends as were payable to E. C. for her own use. These orders having been served upon the Bank of England, the Bank refused in consequence to pay the dividends upon the 12,058l. 6s. 8d. to the executors under A.'s will, and they brought an action against the Bank to recover those dividends; and the Bank now applied for a stay of proceedings on payment of a portion of the dividends:—*Held*, that there was no ground or necessity for the application, the Bank being bound to pay the dividends to the legal owners, the executors, who were answerable for their proper application.

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made absolute or discharged, the said sum of £5000 should stand charged with the payment to the plaintiff (Fowler, the judgment creditor) of the said £213 10s. Against this order cause was shewn before *Rolfe*, B., who ordered that so much of the said dividends only as was payable to E. Churchill for her sole use and benefit, should so stand charged. An application was made in Hilary Term last to set aside this order, on the ground that E. Churchill had no beneficial interest in the fund, but refused (a).

It appeared from the affidavits, that James Churchill, by his will, bequeathed to his brother, George Churchill, for his life, the sum of £5000, parcel of the sum of £12,058 6s. 8d., new 3½ per cent. government stock, with remainder to his brother's wife, Elizabeth Churchill, in manner therein mentioned, the stock to stand in the name of the executors. Previously, and up to the 26th of January, 1843, the sum of £12,058 6s. 8d. was standing in the Bank books in the name of William and George Churchill. Both of these parties, however, died before that day, and the survivor, William, made his will, whereby he appointed Phillis, Samuel, and Charles Churchill, the plaintiffs in the second action, his executrix and executors. The orders of *Parke*, B., and *Rolfe*, B., above mentioned, were made respectively on the 6th of December, 1842, and the 12th of January, 1843. On the 31st of January, application was made to the Bank of England, by the executors, for payment of the dividends on the said sum of £12,058 6s. 8d., but the Bank, in consequence of the above orders, refused to pay the same. The executors then brought an action against the Bank to recover the half-year's dividend due upon that sum.

The *Attorney-General* now moved for a rule to shew cause why the proceedings in this action should not be

(a) See the former case of *Fowler v. Churchill*, ante, p. 57.

stayed, on payment by the Bank of England of a portion of the dividends, notice thereof being first given to the judgment creditor.—The Judge's orders have placed the Bank in a situation of great difficulty. The judgment creditor insists that these orders are binding upon the Bank, and make it compulsory upon it to pay the dividends to him; the executors, on the other hand, contend that the whole of the dividends ought to be paid over to them. The Bank of England is willing to pay into Court, or to the parties entitled, the whole or such part of the dividends as the Court may direct.

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LORD ABINGER, C. B.—I think there is no ground for the rule prayed for, and that the application is unnecessary. When the Judge's orders are made absolute, the executors are chargeable with the proper distribution of the fund, but the Bank is bound to pay it to them. The Bank could not exist, if it were to be affected by orders of this nature in the manner contended for by the judgment creditor.

PARKE, B.—I am of the same opinion. As soon as a Judge's order is made absolute, the executors are liable in the same manner as if the charge had been by deed.

ALDERSON, B.—When an order nisi is made, the Bank ought to hold its hand: and when the order is made absolute, it is in the nature of a charge upon the fund. The Bank is bound to pay the money over to the executors, who are to see that it is properly applied. The Bank, having nothing to do with the distribution of the fund, is not bound to pay the judgment creditor; that is the affair of the executors, who may be bound in equity to pay him.

ROLFE, B.—This point has been much discussed among the Judges, all of whom agree in opinion, that the Bank

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of England has nothing to do with questions between the parties, but is bound to pay over the dividends to the legal owner.

Rule refused.

April 21.

SMITH v. BOND.

Where, in an action for penalties, a Judge's order had been obtained for the delivery to the defendant's attorney of an account in writing of the particulars of the place of residence and occupation of the plaintiff, with a stay of proceedings in the mean time, and a description was accordingly delivered in pretended compliance with the order, but which after verdict was discovered to have been falsely and fraudulently given:—*Held*, that this was not a sufficient ground to stay or set aside the proceedings, the defendant not shewing that he had in fact been prejudiced thereby in his defence to the action; but

THIS was an action to recover from the defendant money won at play from various persons, together with the treble value thereof, under stat. 9 Ann. c. 14, s. 2. The cause was tried before Lord Abinger, C. B., at the Middlesex Sittings after last Michaelmas Term, when the plaintiff obtained a verdict on several counts of the declaration: but in Hilary Term last the defendant obtained a rule to shew cause why there should not be a new trial. Pending that rule, the *Solicitor-General* now applied to stay the proceedings in the action, under the following circumstances. On the 27th of June last a Judge's order was obtained, ordering the plaintiff to deliver to the defendant's attorney an account in writing of the particulars of the place of residence and occupation of the plaintiff, and that in the mean time all the proceedings should be stayed. On the 29th of June an account in writing was delivered, signed by the plaintiff's attorney, which was as follows:—“The plaintiff (Thos. Smith) is an artist, and resides at No. 32, Chapel-street, Grosvenor-square.” Inquiries having been made on several occasions at the house, 32, Chapel-street, it was stated by persons resident there, that there was a person who lodged in the house named Thos. Smith, who was also a portrait painter, but that he was out of town, and his return was uncertain. After the trial, it was discovered that the account in writing, as well

that the parties guilty of the fraud were punishable for the contempt of Court.

Semble, that if the defendant be dissatisfied with the answers given, he should apply at the time for an order for better or more ample information.

as that given at the house, was totally false: that the plaintiff was in point of fact an ivory-turner, who had lived for many years at No. 16, Ryder's-court, Leicester-square.

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The *Solicitor-General* now contended, that it was clear a fraud had been practised upon the Court, as there was no person answering the description given by the plaintiff's attorney, and if that information had not been given, the proceedings would have been stayed under the Judge's order made pursuant to the stat. 2 Will. 4, c. 89, s. 17. [Lord *Abinger*, C. B.—Is not your application too late?] The defendant did not know until lately that the statement was a false one. [Lord *Abinger*, C. B.—If you were not perfectly satisfied with the answer, you should have applied at the time, and the Court would have compelled the attorney to give better information, but if your client was satisfied with the answer at the time, you cannot move now. *Alderson*, B.—Is not your remedy against the attorney for a contempt of Court? *Parke*, B.—You should have gone on making inquiries until you had obtained satisfactory information, and if you could not obtain it, you should then have applied to the Court for better particulars.] The information given was on the face of it sufficient; but it turns out to have been false, and to have been a mere pretended compliance with the order. [Lord *Abinger*, C. B.—The object of the parties was that there should be a real plaintiff.] There was no doubt a real plaintiff, but contrary to the Judge's order he has been concealed from the Court. The Judge's order became a stay of proceedings from its delivery, until the name and address of the plaintiff were given; and that in fact has not yet been complied with. The parties cannot be in a better situation than they otherwise would be, by being guilty of a fraud upon the Court. If the defendant had known who the plaintiff really was, he might have been in a situation

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to have discredited the plaintiff's witnesses, or he might have had some other ground of defence. The address of the plaintiff being false, it is the same as if no description and address had been given. [*Parke, B.*—No doubt the plaintiff or his attorney has been guilty of a contempt of Court, for which he is punishable.] The question is, whether the defendant is to suffer by the plaintiff's non-compliance with the order. It is submitted that the proceedings which have taken place since ought to be set aside.

Lord ABINGER, C. B.—I think the application is made too late for the purpose of staying the proceedings. We might have set aside the proceedings, and granted a new trial, if it had been shewn that the defendant had sustained any real prejudice from the fraud practised upon him. But it is not shewn that if he had known the plaintiff's real situation and address, he could have derived any advantage from it: therefore I think there is no ground to sustain the application. At the same time, I think the parties have been guilty of a fraud upon the Court; and upon application in a proper way, they would no doubt be punished for it.

PARKE, B., concurred.

ALDERSON, B.—I agree, that where the parties can shew that by the altered state of facts they have sustained any real prejudice or inconvenience, they may do so for the purpose of getting a new trial, or setting aside the proceedings; but here it does not appear that the fraud which has been practised has prejudiced the defendant, but all that is shewn is, that the parties are liable to punishment for their contempt of Court.

ROLFE, B., concurred.

Rule refused.

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DOWLING and Others, Executors of BERNARD DOWLING,
deceased, v. FORD.

April 21.

ASSUMPSIT on a promissory note for £50, payable on demand by the defendant to the plaintiffs' testator, with a count upon an account stated with the testator, and a third count on an account stated with the executors since his decease.

Pleas, to the first count, that the defendant did not make the note; to the second and third counts, non assumpsit; and to the whole declaration, *actio non accrevit infra sex annos*, which last plea was traversed by the replication.

At the trial before *Maule, J.*, at the last Spring Assizes at Chester, it appeared that in the year 1835, one Joseph Nodin, being desirous of borrowing the sum of £300 on mortgage of certain property, applied to Mr. Dowling, the testator, to advance him that sum, but the latter, having viewed the property proposed to be mortgaged, and doubting the value of it to be sufficient, declined to advance the money without further security, and the defendant agreed to join Nodin in a joint and several promissory note for £50, with interest at £5 per cent., to make up the deficiency, if any should arise, and as a collateral security for so much of the £300 as was considered insufficiently secured by the deed. The £300 was accordingly paid to Nodin, and the mortgage executed by him, and the note in question given. The mortgage was dated the 11th of November, 1835, and was from Nodin to Dowling, for securing £300, and the deed contained a covenant by Nodin to pay the principal and interest. The note was a joint and several note made by the defendant and Nodin, payable to the plaintiff on demand, with lawful interest, and was dated the 3rd of November, 1835, on which day the £300 was in fact advanced. In order to take the case out of the Statute of Limitations, it was proved that Nodin had regularly paid

N. having applied to D. for a loan of £300 on mortgage, D., doubting the sufficiency of the security, refused to advance it without having, in addition, a joint and several promissory note for £50 from N. and one F., payable on demand. The note and mortgage were accordingly given, the latter containing a covenant by N. to pay the sum of £300 and interest at 5 per cent. Several half-yearly payments of 7l. 10s. each for interest having been made by N. :—*Held*, in an action against F. upon the note, that such payments by N. kept all the securities alive, and prevented the operation of the Statute of Limitations as to the note.

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the interest on the £300, by half-yearly payments of 7*l.* 10*s.* each. There was nothing to shew that the mortgaged premises were not of sufficient value to satisfy the money advanced upon them, nor did it appear that there had been any appropriation of the several amounts paid for interest to the note. It was objected for the defendant, that this evidence was not sufficient to take the case out of the statute as to the note. The learned Judge expressed himself of opinion, that the sums of 7*l.* 10*s.* could not have been due, unless the note was one on which a right of action was then subsisting, and consequently that the evidence was sufficient to prevent the operation of the Statute of Limitations; and the plaintiff obtained a verdict for 52*l.* 8*s.*, with liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that the Judge ought to have directed one.

Evans now moved accordingly.—The half-yearly payment of the sum of 7*l.* 10*s.* by Nodin was not enough to take the case out of the statute as to the note, which was not mentioned at the time. Nodin was liable to pay the money on another contract without reference to the note, and therefore no presumption arises from the payment of those sums, which were clearly paid as the interest due upon the £300 secured by the mortgage. Part payment by a joint contractor is evidence against his co-contractor, because the presumption is that he would not pay unless he was liable for the joint debt; but here there is no such presumption, because there was a separate debt due from the co-contractor, and the payment proved is of the interest due on the amount of that separate debt, and not on the amount of the joint one. [*Parke, B.*—This note was given as a collateral security for part of the £300; and would not the payment of the interest apply to the £50?] No case has ever decided that payment of interest due on a specialty by one took the case out of the statute as to a sim-

ple contract debt due from that one and another jointly. In order to take the case out of the statute, it must be made out that the payment of interest was on account of the note. In all cases where the statute has been held to be satisfied, the part payment has been clearly referrible to the interest of the debt to be taken out of it. *Whitcomb v. Whiting (a)*, where an acknowledgment by one of several makers of a joint promissory note was held to take the case out of the statute as to himself and the other joint makers, was a very different case from the present, where the evidence was of the payment of interest, which must have been paid on a different account from that of the note itself. [*Parke, B.*—Can you make out that the payment of interest must of necessity be applied to the interest secured by the mortgage deed? This is substantially a loan of £300, all of which is secured by mortgage, but part of it, namely £50, is also secured by the promissory note. Then is not the payment of interest referrible to both?] How can a payment of interest, due under a covenant by A. sole, be a part payment on a simple contract by A. and B. jointly, and for a different sum; such payment being made without reference to the joint contract? In *Holme v. Green (b)*, it was held not to be sufficient to shew a payment by a joint maker of a note to the payee within six years, in order to throw it upon the defendant to shew that the payment was not made on account of the note; for an acknowledgment by one partner, to bind another, must be clear and explicit. In *Brandram v. Wharton (c)*, Lord Ellenborough expressed his disapprobation of the doctrine of rebutting the Statute of Limitations by an acknowledgment other than that of the party himself, as established by *Whitcomb v. Whiting*, though he felt bound by that decision. But there is a distinction in that and

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(a) Doug. 629 (b) 1 Stark. N. P. C. 488. (c) 1 B. & Ald. 463.

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all the other cases, that there there was no other security to which the payment could be referred; but here there was such other security, to which it could more reasonably be referred, the payment being of a different sum from that due upon the joint contract. It does not appear that the note was ever referred to. There is no case to be found in which the payment of interest has not been plainly referrible to the document declared on.—He cited *Waugh v. Cope (a)*.

LORD ABINGER, C. B.—It appears to me that the jury have disposed of this case, by finding that it was one transaction. The loan was made on the mortgage, and the note given as a collateral security; and as long as the mortgagor pays the interest on the whole sum, all the securities are kept alive.

PARKER, B.—The question is, whether there was evidence to go to the jury; for if there was, a nonsuit cannot be entered. Now the facts of the case appear to be, that the note was given on the 3rd of November, 1835, and the mortgage, which was executed on the 11th, was to secure £300, part of which, to the extent of £50, is secured by the note. Then is not this in effect a part payment of interest on the note? Is it not a recognition of the transaction, and an acknowledgment of the note? The £50 secured by the note is part of the £300 secured by the mortgage; the note is a collateral security; and then the payment of interest on that £300 is a payment on account of the note.

ALDERSON, B.—I entirely agree with the rest of the Court. Here the mortgagor offers to give a mortgage on

(a) 6 M. & W. 824.

a loan of £300; but doubts are entertained by the lender as to the value of the property, a promissory note is required, and given for £50, payable on demand; which enables the party to consider the mortgage as reduced by £50. That shews it to be a collateral security. The cases put by Mr. *Evans* are only more difficult questions of fact than the present: here there is no difficulty whatever, for the payment of interest was on the whole debt.

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ROLFE, B., concurred.

Rule refused.

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April 26.

EJECTMENT to recover certain premises, of which the defendant was in possession as mortgagee. At the trial before *Alderson, B.*, at the last assizes for the county of Warwick, it appeared that the action was brought by a second mortgagee, on the ground that the first mortgage was given for an usurious consideration, and was therefore void. It appeared in evidence, that in the month of January, 1838, a person of the name of Edwards applied to Messrs. Baxendale & Co., solicitors, London, to procure him a loan of £6700 for a period of twelve months, on the security of certain freehold houses and an advowson. Messrs. Baxendale & Co. applied to the defendant, who said that he did not like the security, but that he would advance the money if Edwards would give a promissory note for the amount, to be discounted by him, the defendant, at

A party having applied to the defendant for the loan of a sum of £6700 for twelve months, on the security of a mortgage of freehold property, the defendant refused to advance the money unless the borrower would give him a promissory note for the amount, to be discounted by him at £5 per cent. This the borrower agreed to, and a bond and mortgage were given for £6700, and the

sum of £6365, the amount of the note minus the discount and charge of preparing the securities, was paid to the borrower. An ejectment having been brought to recover possession of the premises, on the ground that the mortgage was invalid as being given for an usurious consideration, the jury found that the primary object of the transaction was the discounting of the note, the mortgage being only a collateral security in the event of the note not being paid:—*Held*, that the transaction was not usurious, and that the mortgage was valid independently of the recent statutes 7 Will. 4 & 1 Vict. c. 80, and 2 & 3 Vict. c. 27.

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£5 per cent. Edwards consented to the proposal, and the sum of £6365, the amount of the note minus the discount and the charge of preparing a bond and mortgage, which were given for the sum of £6700, was paid to him. The jury found that the primary object of the parties in the above transaction was the discounting the note, and that if the note were not paid, the discount was to be secured by the mortgage, and they found their verdict for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him if the Court should be of opinion that he was so entitled, or to turn the facts into a special case.

Humfrey now moved accordingly.—Even admitting that the transaction as to the discounting of the note would, if it had stood alone, be valid, since the statutes 7 Will. 4 & 1 Vict. c. 80, and 2 & 3 Vict. c. 27, the mortgage given as a collateral security, being a charge on land, is void at common law. The legality, however, of the discounting itself, under the circumstances of the present case, may well be questioned. The law is correctly stated in *Byles on Bills*, p. 202 (a), where it is said, “The ordinary transaction of discounting a bill or note is a lending within the statute. The party discounting does in fact lend money on interest, to be repaid either by the person receiving or by some other party to the bill, at a certain prefixed period. The general rule of law is, that if the interest be retained at the time of the loan, or be stipulated to be paid before it falls regularly due, the contract is usurious. But in favour of trade an exception is allowed in the case of discount of bills, the interest on them being allowed to be retained at the time of the loan; or in other words, interest may be and is always charged, not on the sum actually advanced, but on the sum for which the bill is made payable. This exception is restrained to discounts in the *ordinary course*

of trade, where the excess of charge above the legal rate is fairly referrible to the trouble and expense to which the merchant or banker discounting is exposed." Now this transaction had no reference whatever to trade, and if the practice of taking discount is tolerated only on the ground of the risk and trouble to which the party discounting is exposed, it cannot have the effect of legalising this transaction, where the person advancing the money has the security of a mortgage. In *Marsh v. Martindale* (a), the Court of Common Pleas recognized the doctrine laid down in *Barnes v. Worledge* (b), that if it were agreed that part of the principal should be retained at the time of the loan, or be paid before the expiration of the year, it would be usury, because the borrower would not have the use of the sum upon which the interest was taken for the whole year; and in that case Lord *Abinger* says (c), "It certainly has been determined that such a transaction on a bill of exchange in the way of trade, for the accommodation of the party desirous of raising money, is not usurious, though more than £5 per cent. be taken upon the money actually advanced. In such cases the additional sum seems to have been considered in the nature of a compensation for the trouble to which the lender is exposed, and unless that indulgence be allowed, it might not be worth while for any merchant to discount a bill. But the rule must be confined strictly to that sort of transaction; for if discount be taken upon an advance of money without the negotiation of a bill of exchange, it will amount to usury, as appears clearly from the cases which were cited in the argument."

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LORD ABINGER, C. B.—I am of opinion that there ought to be no rule in this case. It was a question entirely for the jury, whether the discounting of this promissory note

(a) 3 Bos. & P. 154.

Yelv. 30; and Moor, 644.

(b) Noy, 41; Cro. Jac. 25;

(c) P. 158.

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 usury laws. The jury by their verdict have determined that the discounting of the note was a bonâ fide transaction, and they have therefore established the validity of the collateral security. The case of *Barnes v. Worledge* has been frequently overruled.

PARKE, B.—I am also of opinion that, independently of the recent statutes on the subject of usury, this case has been determined by the verdict of the jury. There is no doubt that where a party advancing money takes a higher rate of interest than the law allows, the transaction is usurious, and taints with illegality any collateral security given to protect it. But where there is a bonâ fide discounting of a bill of exchange or promissory note, (and the jury by their verdict find that to have been the real transaction between these parties,) I think that, without referring at all to the modern enactments on the subject of usury, the transaction is legal; and as the discounting of the note was a fair and legal transaction, the collateral security given to protect it must be equally valid. Here the jury have found that the real object of the parties was the discounting of the note, and that being legal, it rendered the security by mortgage also legal. In *Marsh v. Martindale* the question arose on a special case, in which the Court drew the inference from the facts stated that the contract was usurious. I wish not to be understood as expressing any doubt that the transaction would have been valid, even if £10 or £20 per cent. had been agreed to be paid in this case, because the stat. 7 Will. 4 & 1 Vict. c. 80, was in force at the time of the contract, and there is nothing in that statute rendering it less legal to protect such a payment by security on land than in any other way. Under the stat. 2 & 3 Vict. c. 27, it is indeed different, because that statute contains an express proviso that nothing therein contained shall extend to the loan or forbearance

of any money "upon security of any lands, tenements, or hereditaments, or any right or interest therein." It is, however, unnecessary to give any opinion on this part of the case, because, even dealing with it according to the principles of the old law, the jury have by their verdict decided the security to be valid.

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ALDERSON, B.—I am of the same opinion. I thought at the trial that it was altogether a question for the jury to say, what was the primary object which these parties had in view, the mortgage of the land or the discounting of the note. The evidence shewed, and the jury found, that the latter was the real transaction, and I think the giving of the mortgage as a collateral security for the repayment of money, which the law would compel to be paid at the end of the year, could not be usurious.

ROLFE, B., concurred.

Rule refused.

GOULDSWORTH v. KNIGHTS, ELLIOTT, and Others.

April 26.

TRESPASS for breaking and entering a close of the plaintiff's called St. Lawrence Acre, situated in Eastham,

The 59 Geo. 3,
c. 12, s. 17,
enacts, that all
buildings, lands,

&c., purchased or taken on lease by the churchwardens and overseers of the poor of any parish by the authority and for the purposes of that act, shall be conveyed, demised, &c. to the churchwardens and overseers of every such parish and their successors, in trust for the parish; and such churchwardens and overseers, &c. are empowered to take and hold in the nature of a body corporate all buildings, lands, &c. belonging to such parish:—*Held*, that the act made the churchwardens and overseers a corporation of a peculiar kind, differing from ordinary corporations, the object of it being the care and proper management of the parochial property, and that it was competent for any one of the churchwardens or overseers to authorize a distress for rent in arrear.

Certain land was vested in trustees upon trust to apply the rents to the repair of a parish church. Those trustees in 1818 demised to S. for ten years, and again in 1828 for ten years more, which lease expired in 1838. During the lease S. assigned to the plaintiff, and after the expiration of it, the plaintiff continued in possession under the trustees, paying rent to them. The trustees afterwards, and after the 59 Geo. 3, c. 12 came into operation, viz. in 1842, assigned by deed to new trustees, two of whom were the churchwardens of the parish at the time that a distress for rent was made:—*Held*, that the payment of rent to the old trustees was evidence of a new taking under them as tenant from year to year, which precluded the plaintiff from contesting the title of the old trustees, and that the new trustees, who claimed under them by deed of assignment, had a good title by estoppel.

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 1843. goods and chattels of the plaintiff, then found and being
 GOULDSWORTH in and upon the said close, and carrying away the same,
 KNIGHTS. and converting and disposing thereof to their own use.
 Plea, not guilty by statute (11 Geo. 2, c. 19).

At the trial before *Tindal*, C. J., at the last Norwich Spring Assizes, the defendants justified the trespasses complained of under the authority of a warrant of distress for rent in arrear, signed by the defendants, Knights and Elliott, under the following circumstances. On the 10th of October, 1818, Samuel Mitchell, Joseph Stannard, and six others, who were feoffees of the land and premises in question, upon trust to apply the rents and profits to the repair of the parish church of St. Lawrence, Norwich, demised the same to the said J. Stannard for the term of ten years next ensuing the 11th of October then instant, at an annual rent payable half-yearly, on the 5th of April and the 11th of October. In the month of January, 1820, the said Joseph Stannard, with the consent of his co-trustees, under-let the premises to one Charles Beevor, who shortly afterwards gave up possession thereof to the plaintiff, to whom Stannard and the other feoffees granted a sub-lease for the remainder of the term, and at the expiration thereof demised them to the plaintiff for another term of ten years, to expire on the 29th of September, 1838. After that period no fresh lease was granted, but the plaintiff had continued to occupy the premises up to the present time, paying rent to the trustees, who gave him receipts for it; and amongst others a receipt was given for a half-year's rent up to the 11th of October, 1841, which was signed by Samuel Mitchell, one of the feoffees. By indenture, dated the 5th of March, 1842, the surviving trustees conveyed their interest in the premises to eight new trustees, two of them being the defendants Knights and Elliott, by whose authority the distress was made, and

who at the time of the entry and seizure were also churchwardens of the parish of St. Lawrence. At the trial *Byles*, Serjt., objected, that the defendants had failed to establish any justification for the trespasses complained of, inasmuch as the new trustees named in the deed of 1842 took no interest in the land, because by the stat. 59 Geo. 3, c. 12, s. 17, the legal estate in all property held for parochial purposes vested in the churchwardens and overseers as a body corporate for the time being; citing *Doe d. Jackson v. Hiley (a)*, and *Doe d. Norton v. Webster (b)*. The learned Judge, however, directed the jury to find their verdict for the defendants, but gave the plaintiff leave to move to enter a verdict for him.

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Byles, Serjt., (April 24), moved accordingly.—First, the legal estate vested in the churchwardens and overseers of the poor of the parish, under the provisions of the 59 Geo. 3, c. 12, s. 17. By that section it is enacted, “that all buildings, lands, tenements, and hereditaments which shall be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority of and for any of the purposes of this act, shall be conveyed, demised, and assured to the churchwardens and overseers of the poor of every such parish respectively, and their successors, in trust for the parish; and such churchwardens and overseers of the poor, and their successors, shall and may and they are hereby empowered to accept, take, and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands, and hereditaments, and also all other buildings, lands, and hereditaments belonging to such parish.” In *Doe v. Hiley*, it was held that that act vested in the churchwardens and overseers all buildings and lands belonging

(a) 10 B. & C. 885; 5 M. & Ry. 706.

(b) 12 Ad. & Ell. 442; 4 Per. & D. 470.

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to the parish, not merely where the profits thereof were applicable to the relief of the poor, but where they were applicable to the purposes for which church rates are levied. And that case was acted upon by this Court in *Alderman v. Neate (a)*. Therefore, since the passing of that statute, the interest of the trustees ceased, and they had no authority to convey, but the property became vested in the churchwardens and overseers: consequently, a distress authorized by the trustees would be illegal. Then, secondly, although two of these defendants were churchwardens, the legal estate, if it vested in the parish officers at all, vested in them as a body corporate; and without calling a meeting and obtaining the authority of a majority of those present, the distress would be illegal. Now here the distress was authorized by two only out of four of the body corporate, because in this parish there were two overseers who in no way acted in or authorized the making of the distress. And it is clear that the two churchwardens, not being a majority of the body corporate, could have no power to distrain. [*Parke, B.*—The tenant is estopped from disputing the title of the old trustees, to whom he has paid rent since the expiration of the lease, and if so, is he not estopped as to the title assigned by them to the new trustees?] It is submitted that the deed of the 5th of March, 1842, was inoperative, as the property had then become vested in the parish officers, and nothing passed under it, and consequently there was no valid assignment to the new trustees. In *Whitton v. Peacock (b)*, a lessor having only an equitable estate in a certain field, in 1762 demised a portion of the field to a lessee for ninety-nine years. In 1773, the lessor, having acquired the legal estate in the field, demised the residue of the field to the lessee for the same term, by an indenture which recited the former lease, and stipulated for its con-

(a) 4 M. & W. 704.

(b) 2 Bing. N. C. 411; 2 Scott, 630.

tinuing in force, but provided that no more rent should be paid for the entire field than was paid for the part first demised, and that the rent to be paid for the entire field was meant to be the same as that reserved for the first portion of it; it was held, that the assignee of the reversion could not sue the assignee of the lessee upon the covenants in the lease of 1762. And in *Doe d. Higginbotham v. Barton (a)*, where a tenant, let into possession by mortgagor before mortgage, subsequently paid his rent to the mortgagee, it was held, in ejectment by the mortgagor against the tenant, that the latter might defend himself by showing that there had been a prior mortgage, and that he had received notice from the prior mortgagee to pay rent to him, and had paid it accordingly, as the tenant did not thereby deny that the *mortgagor*, who gave him possession, had title, but simply that the *lessor of the plaintiff* had a good derivative title. [Parke, B.—The Court will look into the authorities, and consider whether a rule ought to be granted in this case.]

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Cur. adv. vult.

The opinion of the Court was now delivered by

PARKE, B.—In this case, in which a motion was made the day before yesterday by my Brother *Byles* for a new trial, we are of opinion that there should be no rule.

It was an action of trespass for taking goods, to which the general issue was pleaded by statute. The statute was the 11 Geo. 2, c. 19, and the defence, that the defendants were authorized to distrain for rent in arrear.

The case appeared to be this. Certain land was vested in trustees, upon trust to apply the rents to the repair of a parish church in Norwich. These trustees in 1818 demised to one Stannard for ten years. In 1828 they again de-

(a) 3 Per. & D. 194; 11 Ad. & Ell. 307.

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mised for ten years, which expired in 1838. During this lease, Stannard assigned to the plaintiff, and after the expiration of it the plaintiff continued in possession under the trustees, paying rent to them. The trustees afterwards assigned by deed to new trustees, two of whom were the churchwardens of the parish at the time of the distress, and these authorized the seizure to be made.

My Brother *Byles* objected at the trial, that, by 59 Geo. 3, c. 12, s. 17, the legal estate in the trust land was transferred to the churchwardens and overseers of the parish as a corporation, and cited the case of *Doe d. Jackson v. Hiley (a)*, on the authority of which this Court acted in *Alderman v. Neate (b)*. The decision in *Doe v. Hiley* has been questioned by the Court of Queen's Bench in the case of *Aldson v. Stark (c)*; and on that account, and also considering the observations of the Vice-Chancellor of England, in the case of *Attorney-General v. Lewin (d)*, as to the statute not extending to trusts for special parochial purposes, we should probably have granted a rule if the case had turned upon this question. But it does not; for conceding that by the operation of the statute the legal estate was transferred to the churchwardens and overseers in 1819, it was a corporation of a peculiar kind, differing from all ordinary corporations; and considering the objects for which the statute made the parochial officers a corporation, which was the care and proper management of the parochial property, we have no doubt that it was competent for any one churchwarden or overseer to make or order a distress to be made without calling a meeting of all, and having the authority of the majority of those present. The defendants were therefore entitled to a verdict on this ground.

Another answer was given by the Court to my Brother *Byles's* application, which I notice, that we may not be

(a) 10 B. & Cr. 885.

Ell. 255.

(b) 4 M. & W. 704.

(d) 8 Sim. 366.

(c) 1 Per. & D. 183; 9 Ad. &

supposed to have acquiesced in his argument. It was this. The plaintiff had paid rent to the old trustees more than once, and this was, no doubt, evidence of a *new taking* under them, as tenant from year to year, and such new taking precluded the plaintiff from contesting the title of the old trustees, and consequently that of the new trustees, who claimed under them by an assignment by deed, and had a good title by estoppel, supposing that the estate had already passed to the corporation of churchwardens and overseers. But my Brother *Byles* contended, that as the old trustees had no title at all, nothing would pass by their grant to the new trustees, and he referred to two recent cases as establishing this proposition, which the Court have since had an opportunity of examining. Neither of those cases is applicable. The first was that of *Whitton v. Peacock* (a), in which the substance of the marginal note is, that if a person, who has an equitable estate only, demises by deed, and then conveys the reversion, the assignee cannot maintain an action on the covenants in the lease. That is very inaccurate. The point decided was this:—A copyholder devised his estate to another, without surrendering to the use of his will. The devisee of the devisee, who of course had no estate at all, either legal or equitable, demised part of the copyhold by deed, and the lessee covenanted to pay rent, and assigned the lease. The heir-at-law of the deviser afterwards surrendered to the use of the second devisee, who afterwards demised another part of the copyhold to the same lessee, and instead of granting a fresh lease to the lessor of the part before demised, took a covenant from him to perform the covenants in that lease. The lessor afterwards surrendered the copyhold to another; and the question was, whether the surrenderee could maintain an action on these covenants against the assignee of the lessee. The Court held most

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properly that no such action would lie. No reasons are given, but there is clearly a satisfactory one; for the reversion by estoppel on the first lease was not a copyhold transferable by surrender and admittance. The other case referred to was *Doe d. Higginbotham v. Barton (a)*. In that case, one who had only an equity of redemption, granted a mortgage to the lessor of the plaintiffs, who brought an ejectment; and the defendants, the tenants, were permitted to shew that there was a prior mortgage, and that the first mortgagee had given notice to them to pay to him. This was equivalent to shewing eviction by title paramount.

We are of opinion, however, on the first ground, that the defendants were clearly entitled to a verdict, as the churchwardens, both or either, had authority to order a distress.

Rule refused.

(a) 3 Per. & D. 194.

April 22.

SIMPSON v. READY.

The stat. 5 & 6 Vict. c. 104, s. 1, enacts, that from and after the passing of the act, the word "contract" in s. 28 of 5 & 6 Will. 4, c. 76, shall not extend or be construed to extend to any lease &c.:—*Held*, that such enactment did not alter the construction to be put upon the previous act, so far as it related to any action commenced before the 10th August, 1842, when the latter act passed.

COLE moved for a rule calling upon the defendant to shew cause why this action should not be discontinued without payment of any costs; or why all further proceedings therein should not be stayed. By the affidavits in support of the application, it appeared that the action was commenced on the 3rd of March, 1842, and was brought to recover a penalty of £50 and costs under the 5 & 6 Will. 4, c. 76, s. 53, in consequence of the defendant having acted as a councillor of the borough of Lichfield at a time when he was disqualified to be or to act as a councillor under sect. 28 of the same act, by reason of his having a share or

interest in an indenture of lease granted by the corporation of Lichfield to one John Robinson, in which were contained the usual covenants for payment of rent, repairs, &c. It had been decided that a lease was a "contract" within the meaning of that section (a). The declaration was delivered on the 24th March, 1842; the defendant pleaded on the 29th April, 1842, and obtained an order to amend his plea on the 12th July, 1842. Afterwards, viz. on the 10th August, 1842, the stat. of 5 & 6 Vict. c. 104, was passed, whereby, after reciting that doubts had arisen as to the extent and meaning of the words "contract" and "office or place of profit" in the 28th section of the act 5 & 6 Will. 4, c. 76, and the corresponding section in the Irish act of 3 & 4 Vict. c. 108, and that it was expedient that such doubts should be removed, it was enacted, "*that from and after the passing of this act, the word 'contract' in the said respective enactments shall not extend or be construed to extend to any lease, sale, or purchase of any lands, tenements, or hereditaments, or to any agreement for any such lease, sale, or purchase, or for the loan of money, or to any security for the payment of money only.*" Sections 3 & 4 enabled the defendants in any actions commenced before the passing of that act for the recovery of any pecuniary penalty or penalties incurred under the said enactments (by reason of any extension or construction of the word "contract" therein contained, beyond or different from what is therein enacted,) to apply to the Court or a Judge for an order to discontinue such action, upon payment of the costs thereof out of pocket. Sect. 5 provided and enacted, that in all cases in which such actions should have been commenced at any time subsequent to the 8th February, 1842, (which was the case here), it should be competent for such Court or Judge as aforesaid to make such order as aforesaid for discontinuing the same, without

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(a) *Reg. v. York*, 2 Gale & D. 105.

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payment of any costs, and upon making such order such action should be forthwith discontinued. *Cole* submitted that although sections 3 & 4 appeared to be confined to applications made at the instance of the defendant only, yet that section 5 was not so limited; and that the Court, either by virtue of that section, or of their general jurisdiction over the proceedings in their Court (*a*), might make the order now applied for. He also submitted that in consequence of the passing of the 5 & 6 Vict. c. 104, this action could not be supported: *Warne v. Beresford* (*b*).

PARKE, B.—When an act of Parliament is repealed, the law is as if it had never passed; but here the first section of the stat. 5 & 6 Vict. c. 104 merely alters the law as laid down in *Reg. v. York* (*c*), with respect to proceedings commenced after the passing of that act. This is evident from the subsequent clauses, which enable a defendant to obtain a stay of proceedings upon payment of the costs out of pocket. You may take a rule nisi if you like; but I am clearly of opinion, that unless the defendant chooses to make such an application, the penalty may be recovered, notwithstanding any thing contained in the 5 & 6 Vict. c. 104.

ALDERSON, B., and ROLFE, B. (*d*), expressed themselves clearly of the same opinion, whereupon

Cole declined to take any rule.

(*a*) *Cocker v. Tempest*, 9 Dowl.
P. C. 306.
(*b*) 2 M. & W. 848.

(*c*) 2 Gale & D. 105.
(*d*) Lord Abinger, C. B., had left
the Court.

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1843.ISHERWOOD v. WHITMORE and Others, Assignees of
JARRATT, a Bankrupt.*April 28.*

ASSUMPSIT. The first count of the declaration stated, that before and at the time of the making of the agreement next hereinafter mentioned, the plaintiff was possessed and had possession of divers goods, to wit, 2000 hats, of the value, to wit, of £1000, which goods then were the property of the defendants, subject to a lien which the plaintiff then had thereupon, the said lien then being of great value, to wit, of the value of £250; and thereupon, before the commencement of the suit, to wit, on the 23rd day of July, 1842, it was agreed between the plaintiff and the defendants, that the plaintiff should deliver up to the defendants the said goods and abandon his said lien thereon, and that the defendants should therefore pay the plaintiff the sum of £250 upon the delivery of the said goods to the defendants. The declaration then alleged mutual promises, and averred that after the making of the said agreement and promises, and before the commencement of this suit, to wit, on the day and year last aforesaid, the plaintiff was ready and willing and then tendered and offered to deliver up the said goods to the defendants, and to abandon his said lien thereon, and then requested the said defendants to accept the said goods and the said abandonment of the said lien of the plaintiff, and to pay the plaintiff the said sum of £250; and although the plaintiff had always performed the said agreement in all things on his part to be performed, yet the defendants, not regarding, &c., did not nor would, when they were so requested, or at any time before or since, accept the said goods or any of them, or the abandonment of the said lien of the plaintiff, or pay the plaintiff the said sum of £250 or any part thereof, but then and always neglected and refused so to do.

There was a second count upon an account stated. The

An allegation of a tender of goods is not supported by proof of a delivery or offer to deliver closed casks, said to contain them; but they should be tendered in such a way that the party may have a reasonable opportunity of inspecting them, and of ascertaining whether what he has bargained for is presented for his acceptance.

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defendants pleaded, first, non assumpserunt; secondly, a traverse of the tender of the hats, as alleged in the declaration.

At the trial before Lord *Abinger*, C. B., at the London sittings after last term, it appears that the hats originally belonged to one Arthur Jarratt, who had become bankrupt, and the defendants were his assignees. Jarratt had, previously to his bankruptcy, deposited these hats with the plaintiff, who had a lien upon them for £250, the amount claimed. A long correspondence took place between the plaintiff and defendants after the bankruptcy, and which was given in evidence, by which it was agreed that the defendants should discharge the lien and take the hats. The defendants accordingly went for the hats to a wharf where, as they had been previously informed, the hats would be delivered to them on payment of the money; and were there shewn two closed casks, which they were told contained the hats, but the persons who had the charge of them refused to allow the defendants to open the casks or to inspect their contents. On this state of facts, it was objected for the defendants, that in order to make out the allegation in the declaration that a tender had been made, it ought to have been shewn that the hats were offered in such a way that the defendants had an opportunity of inspecting them. The Lord Chief Baron, reserving leave to the defendants to move to enter a nonsuit, left it to the jury to say whether they were satisfied that the defendants had by the contract, as collected from the correspondence, agreed to take the hats without requiring an inspection of them or not, and they found that the defendants were not to have an inspection of them, and gave their verdict for the plaintiff, with £250 damages.

M. D. Hill having obtained a rule to enter a nonsuit on the point reserved, or for a new trial, on the ground that the learned Judge had misdirected the jury, in leaving to them the question whether there was an agreement to take the

hats without inspection, there being no evidence of such a contract ;

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Platt and Byles, Serjts., now shewed cause.—A party tendering goods in pursuance of a contract is not bound to allow an inspection of them in the first instance, and if the party to whom they are offered refuses to receive them, he does so at his peril. It is otherwise where there is a contract for the purchase of goods by sample, in which case the buyer is always entitled to inspect the bulk before he can be compelled to pay for it. But when a chattel is identified by description, as was the case here, no such right exists, for the property passes by the contract. [*Parke*, B.—There is here no question about the passing of the property ; for inasmuch as the plaintiff claims only a lien upon the hats, they are admitted to have belonged to the defendants from the beginning. The casks might have contained nothing, or anything else than the hats. Ought you not to have given the parties a reasonable opportunity of seeing whether or not the hats were there? There is nothing to shew any contract that he was to purchase the hats without looking at them. *Alderson*, B.—It is clear they agreed to buy the hats without reference to the quality ; but does it follow that they were to do so without seeing them?] But although there may be a right of inspection, it does not merely follow that it is a condition precedent ; and an inspection in this case would have been attended with much inconvenience, as it could not have been had without taking out all the hats, which would amount to several thousands. In *Pettit v. Mitchell* (a), it was held that the purchaser of goods at an auction is not entitled to measure them before he paid the money. [*Parke*, B.—In that case the purchaser had an opportunity of inspecting the lots before they were put up for sale, as two days were given to inspect the articles before the day

(a) Law J., vol. 12, N. S., C. P. 9.

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of sale.] In the present case the jury have found that by the terms of the contract the defendants were not to have an opportunity of inspection. [*Parke, B.*—Yes, but the meaning of that was, that they were not to have the option that ordinary persons have; that is, without inspection so as to ascertain the value.] The defendants in making the agreement relied upon the honour of the plaintiff to deliver the article correctly and according to contract, and the jury must be taken as finding affirmatively the existence of such a contract.

M. D. Hill, Ball, and Gale, in support of the rule, were stopped by the Court.

PARKE, B.—It is perfectly clear in this case that there was no tender of these goods. A tender of goods does not mean a delivery or offer of packages containing them, but an offer of those packages, under such circumstances that the person who is to pay for the goods shall have an opportunity afforded him, before he is called on to part with his money, of seeing that those presented for his acceptance are in reality those for which he has bargained. We so decided when this case was before us on the argument of the demurrer, and by which decision we mean to abide (a). This case is quite distinguishable from that of *Pettit v. Mitchell*, which has been relied on by the plaintiff; for looking at the contract of sale in that case, it was evidently part of the agreement between the parties, that after the sale the lots were to be taken away by the purchaser without any further inspection. The next question here however is, whether the Lord Chief Baron was right in leaving it to the jury to say whether there had been a special contract to take these goods without any inspection, to see if they were really those bargained for. I am satisfied that he did not mean to put the question to them in that sense; there was nothing in the case to warrant his doing so; but that they

(a) 10 M. & W. 757.

were to say whether the assignees were to have the ordinary opportunity to which persons purchasing articles are entitled, namely, of inspecting the articles they have delivered to them, in order to see whether they were of the right quality, or whether, on the contrary, they were not to take the articles such as they were delivered to the plaintiff by the bankrupt Jarratt, and on which the plaintiff had a lien. If, however, it is said that the Lord Chief Baron left to the jury to say whether the assignees had agreed to take whatever the cask might have contained, I do not think there was any warrant for his leaving such a point; but, as I have said before, I am satisfied he did not mean that, but merely that they were not to have an opportunity of seeing if the articles were merchantable. That appears to me to be the true question, and the verdict of the jury affirming that proposition was perfectly right, and amounts to a finding that the defendants were to take these hats, whatever their quality. An authority for this position is furnished in *Co. Litt.* 208. a., where it is said, "the feoffee may tender the money in purses or bags, without shewing or telling the same, for he doth that which he ought, viz. to bring the money in purses or bags, which is the usual manner to carry money in, and then it is the part of the party that is to receive it to put it out and tell it." For that position *Wade's case* (a) is cited as an authority, and shews that the party to whom the tender is made ought to have an opportunity of seeing the money or goods which are the subject of it. The verdict for the plaintiff on the first plea must therefore remain, but on the plea of tender it must be entered for the defendant.

ALDERSON, B.—I am of the same opinion. The jury have found by their verdict, and I think reasonably and

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(a) 5 Rep. 115.

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properly found, that the bargain between these parties was, that the assignees were to take the hats in the actual condition in which they then were, provided that those sent were the very identical hats received by Isherwood from the bankrupt. Provided that condition was complied with, the assignees were bound to take the hats in whatever condition they might then be, and would have no right to inspect them for the purpose of seeing that they were then in a marketable state. Such is in substance the finding of the jury; and I think that on these pleadings it was necessary to satisfy them, that the defendants, before they were required to pay down the money, had an opportunity of inspecting the articles, in order to see that they were the same hats. It appears from the evidence that they were sent in two covered cases, and the question comes to this, were the assignees bound to take the word of Isherwood that those hats really were contained in those cases, or had they not a right to see that Isherwood spoke the truth in this respect, before they were called on to pay for the article, although they could not object to the quality of it?

ROLFE, B., concurred.

Rule absolute.

May 1.

NASH v. BREEZE.

Where a plea qualifies the contract stated in the declaration, and introduces a new stipulation into it, it is bad as amounting to the general issue, although in truth it only

ASSUMPSIT. The declaration stated, that it was agreed by and between the plaintiff and the defendant, that the plaintiff should sell, and the defendant buy, a certain messuage, farm, and lands, for the sum of 5s.: that it was further agreed, that the defendant, on or before the 29th September 1842, should pay for the tenant's fixtures,

sets out what was the *actual* agreement between the parties.

manure, &c., which should be left by the plaintiff on the 29th of September, such sum as should be determined upon by a valuation, in case it should be made over before the 29th of September. It then averred, that the fixtures, manure, &c., were left on the premises; that they were worth £1000; and assigned as a breach, the non-payment of that sum to the plaintiff.

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The defendant in his plea set out the *actual* agreement between the parties, as follows; that the said agreement in the first count mentioned was a certain agreement made on the 27th of June 1842, between the plaintiff and the defendant, by which the plaintiff agreed to sell, and the defendant to buy, all the messuage, farm, and lands, as the same were comprised in a certain indenture of lease of the 29th of April 1842, for the residue of a term of fourteen years. The plea then set out the agreement as stated in the declaration, and proceeded as follows: "That it was further agreed, that the plaintiff, on receiving the sum of 5*s.*, and such sum as should be the fair and reasonable value of the fixtures, manure, &c., should and would execute a proper assignment of the said indenture of lease for the residue of a term of fourteen years, subject as aforesaid, unto the said defendant; and further, that upon the execution of such assignment and payment made as aforesaid, the said defendant should be put into possession of all the said premises, fixtures, goods, chattels, &c." The plea then averred, that the plaintiff did not nor was he ready and willing to execute an assignment of the said indenture to the defendant, nor did he nor was he ready and willing to put the defendant into possession of the premises, fixtures, goods, chattels, &c.

Special demurrer, assigning for causes, amongst others, that the plea neither confessed nor avoided the causes of action in the declaration mentioned, nor traversed any material averment therein, and that it amounted to the general issue.—Joinder in demurrer.

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Horn, in support of the demurrer.—The plea is bad, as amounting to the general issue. The contract alleged in the declaration is, that the defendant was to pay a reasonable sum for the fixtures and manure, whereas the contract stated in the plea is, that the defendant was not to pay the money until an assignment had been made of the indenture of lease, and possession given of the premises and fixtures. It therefore states a contract different from that alleged in the declaration, instead of confessing and avoiding it. The agreement stated in the declaration is an agreement without a condition, but that set forth in the plea is clogged with the condition that the plaintiff shall execute an assignment of the lease, and deliver possession of the premises and fixtures. The contract stated in the plea qualifies that stated in the declaration, and in substance amounts to non assumpait. What was said by *Tindal*, C. J., in delivering the judgment of the Court in *Whittaker v. Mason* (a), is applicable to the present case. "We think this plea, which seeks to introduce a new condition into the special promise stated in the declaration, does not admit that promise, and excuse the non-performance of it, but does in effect deny that such promise was ever made." Here the plea introduces a new contract. In *Brind v. Dale* (b), which was an action against a carrier to recover the value of goods delivered to him to be taken care of and safely carried by him, as such carrier, in his cart from N. to B., and there safely delivered by him for the plaintiff, but which were lost by his negligence, the defendant pleaded, that when he received the goods, an express condition and agreement was made between him and the plaintiff, that the plaintiff should accompany the cart, and watch and protect the goods from being lost or stolen, but that he neglected and refused so to do; this plea was held bad on special demurrer, on the ground that as it

(a) 2 Bing. N. C. 359; 2 Scott, 567.

(b) 2 M. & W. 775.

qualified the contract, it amounted to the general issue. *Exch. of Pleas, 1843.* So here, not only the contract stated in the declaration is qualified, but a new condition is alleged. [*Parke, B.*, referred to *Passenger v. Brooks*, as correctly reported in 1 Scott, 560, but mistakenly in 1 Bing. N.C. 587.] In *Alexander v. Gardner (a)*, which was an action for goods bargained and sold, leave was refused to the defendant to plead that the goods were sold under a written contract, which the plaintiff had not complied with, as evidence of such a contract might be given under the general issue. That was an attempt to set up a totally different contract from that declared on, which the Court refused to allow, as it amounted to the general issue.—He also cited *Kemble v. Mills (b)*, and *Jones v. Nanney (c)*, as overruling *Edmunds v. Harris (d)*.

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Ogle, contra.—If the declaration and the plea are looked to, it will be seen that the defendant could not raise this defence under the general issue. The contract declared on is not that which was in fact made between the parties; and if the defendant be not allowed to set out the real contract in his plea, he will be placed in this difficulty, that if the plaintiff can establish his case without producing the written agreement, he may succeed at the trial, contrary to the merits of the case, as in that case he would not be bound to prove the execution of the assignment, or the giving up possession of the premises and fixtures, which were acts to be done by the plaintiff contemporaneously with the payment of the money by the defendant.

PARKER, B.—I think the plea is bad; for it certainly qualifies the contract stated in the declaration, and intro-

(a) 1 Scott, 281; 3 Dowl. P. C. N. R. 121.
146. (c) 1 M. & W. 359.
(b) 1 Man. & Gr. 757; 2 Scott, (d) 2 Ad. & Ell. 414.

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duces a new condition into it, and therefore amounts to the general issue. At the same time, the plaintiff had better consider whether he will not amend his declaration, by averring that he has always been ready and willing and tendered and offered to execute an assignment of the indenture, and to give possession of the premises and fixtures; for I incline to think that those acts and the payment of the money were intended to be contemporaneous. If the plaintiff thinks fit to amend his declaration, there will be no costs on either side (a).

ALDERSON, B., and ROLFE, B., concurred.

Leave to amend accordingly.

(a) The plaintiff amended his declaration pursuant to this recommendation.

May 1.

HESKETH v. FAWCETT.

A declaration in assumpsit alleged, that the defendant was indebted to the plaintiff in £100 for work and labour, and in £100 on an account stated. The defendant pleaded, as to £10, parcel &c., a tender of that sum. Replication, that

ASSUMPSIT. The declaration stated, that the defendant was indebted to the plaintiff in £100 for work, labour, and materials, and in £100 for money due on an account stated. Plea, as to £10, parcel &c., a tender, and payment of that sum into Court.

Replication, that before the making of the tender alleged in the plea, and before and at the time of the demand and refusal hereinafter mentioned, a larger sum than £10, to wit, the sum of £31, being part of the money in the declaration stated, that before the making of the tender alleged in the plea, and before and at the time of the demand and refusal hereinafter mentioned, a larger sum than £10, to wit, £31, being part of the monies in the declaration mentioned, including the said sum of £10, was due on account of one and the same of the causes of action in the declaration mentioned, and that, before the tender, the plaintiff demanded the said sum of £31, which the defendant refused to pay:—*Held*, on special demurrer, that the replication was insufficient, as it did not shew that the £31 was due on one entire contract.

Semble, that where a sum is due on one entire contract, as on a bill of exchange or promissory note, and the defendant pleads a tender of a smaller sum, the plaintiff may reply that he demanded the larger sum, and that the defendant refused to pay it.

claration mentioned, the said sum of £31 including the said sum of £10, was due from the defendant to the plaintiff on account of one and the same of the said causes of action in the declaration mentioned, to wit, the said cause of action in the said first count mentioned; and that before the making of the said tender in the plea alleged, to wit, on &c., the plaintiff demanded of the defendant payment of the said sum of £31, which so then included the said sum of £10, yet the defendant did not pay to the plaintiff the said sum of £31, or any part thereof, but then wholly neglected and refused to pay to the plaintiff the said sum of £31, or any part thereof.—Verification.

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Special demurrer, assigning, among other causes, that the replication admits the tender of the sum of £10, but does not avoid the effect of such tender by shewing a subsequent demand of that particular sum, and also that the replication does not shew with sufficient certainty that the sum of £31 constituted a debt due upon one entire contract.—Joinder.

Cowling, in support of the demurrer.—The replication is bad. It states that at the time of the tender a larger sum was due to the plaintiff, which before the tender he demanded, and the defendant refused to pay. It therefore admits the tender of the sum mentioned in the plea, but affords no answer to it. *Tyler v. Bland* (a), where a similar replication was held good, will perhaps be relied on; but that case was not very fully argued, and the Court merely intimated that the defendant had better amend and rejoin by re-alleging the tender, and denying that more was due. Until that case, such a replication was unknown, and it must be bad, because it makes the amount of the debt actually due, or at least whether or not more than the sum tendered was due, material. Since that decision, a similar

(a) 9 M. & W. 338.

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point came before the Court of Queen's Bench in last Michaelmas Term, in the case of *Brandon v. Newington (a)*. There, to an action of debt for goods sold, the defendant pleaded, except as to 1*l.* 17*s.*, *nunquam indebitatus*, and as to that sum a tender; to the latter plea the plaintiff replied, that before and at the time of making the tender, and before and at the time of making the demand and refusal thereafter mentioned, a debt amounting to a larger sum than 1*l.* 17*s.*, to wit, 2*l.* 7*s.*, including the said sum of 1*l.* 17*s.*, was due, and that before the tender, and whilst the said sum of 2*l.* 7*s.* remained unpaid, the plaintiff demanded payment of the said sum of 2*l.* 7*s.*, which so included the said sum of 1*l.* 17*s.*, parcel &c., yet the defendant did not pay the said sum of 2*l.* 7*s.*, or any part thereof, and that no set-off or other just cause of action then existed for non-payment by the defendant of the same, or any part thereof; and it was held, on special demurrer, that the plea of tender was good, and that the replication was no answer to it: and the Court, in giving judgment, said that in the case of *Tyler v. Bland* this Court did not advert to the principle of the two cases of *Spybey v. Hide (b)* and *Rivers v. Griffiths (c)*. If indeed there be one entire debt, and the defendant pleads a tender of part of it, it would be sufficient to reply that a larger sum was due, which the plaintiff demanded, but the defendant refused to pay, if the larger sum became due by virtue of the contract at a particular time, and *before* the tender; because in such a case damages for non-payment would or might have arisen, as in the case of bills of exchange, &c. That was the principle upon which the case of *Cotton v. Godwin (d)* proceeded, the cause of action being one entire claim, in respect of a promissory note; to which it was no answer to say that the defendant had tendered part of the sum after the note became due. But the replication

(a) Not yet reported, except in
Law J., Vol. 12, N. S., p. 20, Q. B.

(c) 5 B. & Ald. 630; 1 D. &
R. 215.

(b) 1 Camp. 681.

(d) 7 M. & W. 147.

in this case should have averred that the £31 was due in respect of one entire debt. If this replication be held good, the plea of tender might as well be taken away, for it would become almost useless, since few actions are brought where there has not been a previous demand of a larger sum than the amount tendered. It is a common course to plead a tender to a part of the debt, and a plea of tender of part of the sum claimed has always been considered good as to so much. Thus in *Co. Entries*, 141 b, the defendant, to an action of debt on bond, pleaded a tender to part of the sum claimed. And in *Haldenby v. Tuke* (a), where the declaration contained four counts, each for the sum of 3*l.* 18*s.* 10*d.*, and a tender of the sum mentioned in the first count only was pleaded, to which the plaintiff replied a demand and refusal of that precise sum before the commencement of the action, it was held that the replication was good. That shews what the true replication is. So, from *Giles v. Hart* (b), which was one of the earliest cases on this subject, it appears that the demand and refusal should be of the sum tendered; and there, too, it was a tender of part. The case of *Cotton v. Godwin* is not at all impeached by this argument. [*Parke, B.*—Is there any precedent to shew, that in an action for £100 on a promissory note, it is a good plea to say that the defendant tendered £50?] It is admitted, that when the bill is overdue, a tender of part would be bad; otherwise there seems no reason why, if a party tendered a part of the money mentioned in the note on the day it became due, he should not be allowed to plead the tender as to such part. [*Parke, B.*—No; the principle of a tender is, that the party has performed his contract, which in that case he could only do by a tender of the entire sum. Here the difficulty arises from the general

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(a) *Willes*, 632.

(b) 1 *Ld. Raym.* 254; 12 *Mod.* 152.

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form of the declaration, which may apply either to one or to several contracts. It is different where the replication shews that the sum tendered was part of a larger sum due upon one entire contract, which larger sum was demanded before the tender.] Where there is nothing but an ordinary claim like the present, and the debt is not shewn to be one and entire, such a replication as the present is insufficient.

Tomlinson, contra.—Although in *Tyler v. Bland* the case of *Rivers v. Griffiths* was not adverted to, that of *Cotton v. Godwin* was referred to, where *Rivers v. Griffiths* was cited and commented upon. The true principle of the plea of tender is that stated by *Parke, B.*, in *Cotton v. Godwin*, viz. that the defendant has performed, so far as he could perform, his part of the contract, by being always ready to pay the debt, and actually offering to do it. And that case shews that where there is an entire demand, and a plea of tender of a smaller sum, the plaintiff may reply that a larger sum was due, which he demanded, but payment of which was refused. [*Parke, B.*—The difficulty here is, that the replication does not aver that the amount tendered was parcel of *one entire sum*. Is not your replication bad for want of that averment?] It does aver that “the sum of £31, including the said sum of £10, was due from the defendant to the plaintiff on account of *one and the same of the said causes of action* in the declaration mentioned;” and that, it is submitted, is equivalent to an averment that it was due on one and the same contract. [*Parke, B.*—No; it is one cause of action for work and labour, which may arise from ten different employments or contracts. If the debt of £31 arose from one entire contract, had you not better amend by replying that fact?]

Tomlinson, thereupon, had leave to amend on payment of costs.

Amendment accordingly.

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THOMPSON v. BILLING.

April 20.

PETERSDORFF had obtained a rule, calling upon the plaintiff to shew cause why so much of a rule as directed that the defendant should pay the plaintiff the taxed costs of making a Judge's order a rule of Court, should not be set aside. It appeared from the affidavits, that Messrs. Mayhew & Co. received instructions from an attorney in the country, whose town agents they were, to take out a summons to set aside an interlocutory judgment for the plaintiff in this cause; which summons, on the hearing, was discharged with costs. On the 16th of January the plaintiff's attorney taxed those costs, and on the evening of the same day made a demand at the office of Mayhew & Co. of the amount specified in the allocatur. Mayhew & Co. declined then to pay it, saying that they had no instructions to pay the costs, but that they would write to their principal in the country, and advise payment of them; which they did. On the 17th, the order was made a rule of Court, the payment of the costs of making it a rule of Court being made a part of the rule, pursuant to Reg. Gen., May 27, 1840 (a).

Costs due under a Judge's order and allocatur thereon, are payable on demand. Therefore, where costs due from a defendant under a Judge's order were demanded from the town agent of the defendant's attorney, who did not pay them, alleging that he had no instructions to do so, but would write into the country and advise payment:—*Held*, that the order was *disobeyed*, and that the defendant was liable to the costs of making it a rule of Court, under Reg. Gen., May 27, 1840.

Kelly shewed cause.—Two questions arise in this case: first, whether the Judge's order has been *disobeyed*, within the meaning of the rule of 27th May, 1840, which makes the ordering of payment of the costs as part of the rule of Court, conditional on the production of an affidavit "that the order has been served on the party or his attorney, and *disobeyed*;" secondly, whether service on a London agent is to be considered as service upon the attorney of the party, within the meaning of the same rule. First, the Judge's order was disobeyed, as soon as payment of

A town agent, conducting the cause in the Court above, is an "attorney" within the meaning of that rule.

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the costs was refused, for the party is bound to have the money ready to answer the demand. Secondly, service on the town agent is sufficient. [*Parke, B.*—The Court has no doubt on that point. We have conferred with the Masters, and we think that in this case the words “attorney” and “agent” mean the same thing. The “attorney” means the party who carries on the business in the Court above.]

Petersdorff, contra.—There has been no disobedience of the Judge’s order. The agent replies to the demand, that he has no instructions as to the payment, but will write into the country and advise it. That is not such a refusal as constitutes a disobedience of the order. A judgment may undoubtedly be executed without any demand made; but it could hardly have been intended to place a Judge’s order and *allocatur* thereon in all respects upon the same footing as a judgment.

PARKE, B.—I think this rule ought to be discharged. The costs that were due under the Judge’s order were demanded of the proper party, and not paid by him. It was the duty of the defendant to have provided his attorney with money to answer the demand. It is much better to lay down a general rule for such cases, than to adopt a principle which is to vary with the distance of the party’s residence, or with the circumstances of each particular case.

ALDERSON, B.—I am of the same opinion, and think the Judge’s order has been disobeyed. The object of the proviso in the rule of Court was, that the party should not be compellable to pay the costs of making a Judge’s order a rule of Court, unless an opportunity had been afforded him of payment of the sum due under the order. In the present case that opportunity was given. The defendant

is ordered to pay certain costs, and does not obey that order. It is true he assigns a reason for not obeying it, but still he does disobey it.

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GURNEY, B., concurred.

Rule discharged, with costs.

EDWARDS and Others, Assignees of MARSHALL and HALL,
Bankrupts, v. HOOPER and Another.

April 20.

TROVER by the plaintiffs, as assignees, against the sheriff of Middlesex. The first count of the declaration stated, that heretofore, and before the said G. J. Marshall and W. C. Hall became bankrupts, to wit, on &c., the said G. J. Marshall and W. C. Hall were lawfully possessed as of their own property of certain goods and chattels, &c.: that, before they became bankrupts, the said goods came into the possession of the defendants by finding; yet the defendants, well knowing the said goods to be the property of the said G. J. Marshall and W. C. Hall before their bankruptcy, and of right to belong and appertain to the plaintiffs, as assignees as aforesaid, after the bankruptcy, afterwards, *and since the said bankruptcy*, converted and disposed thereof to their own use. The second count stated, that the plaintiffs, after the bankruptcy, to wit, on the 11th November, 1842, were lawfully possessed of other goods, of

Declaration in trover by assignees of a bankrupt stated, that M. and H., the bankrupts, before their bankruptcy, were lawfully possessed of certain goods; that before the bankruptcy they came to the possession of the defendants; and that the defendants, knowing the goods to belong to the plaintiffs as assignees, *after* the bankruptcy, converted them.

A separate commission issued against M. alone on the

7th of November; on the 8th, the goods were sold by the defendant, as sheriff; on the 9th, a joint commission issued against M. and H., under which the plaintiffs were appointed assignees; and the plaintiffs afterwards, and after the goods were delivered to the purchasers, demanded them of the defendants, who refused them:—

Held, first, that the sale, and not the demand and refusal, constituted the conversion; secondly, that the allegations of the declaration, that the plaintiffs were possessed of the goods as assignees of both bankrupts, and that the defendants converted the goods *after* the bankruptcy, were not supported by the evidence.

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the like description &c., as such assignees as aforesaid, and that the defendants afterwards, to wit, on the day and year aforesaid, converted and disposed thereof to their OWN USE.

The defendants pleaded not guilty, not possessed, and several other special pleas, which it is not necessary to state.

At the trial before Lord *Abinger*, C. B., at the London sittings after Hilary term, it appeared that on the 7th of November, 1842, a separate fiat in bankruptcy issued against Marshall. The seizure by the sheriff, and sale, of the goods in question, took place on the 8th. On the 9th, a joint fiat issued against both Marshall and Hall. On the 13th January, 1843, after the goods had come into the possession of the purchasers, the plaintiffs, as assignees under the joint fiat, made a written demand of the goods upon the sheriff. Upon these facts, the Lord Chief Baron was of opinion that the plaintiffs must be nonsuited, inasmuch as no conversion had been proved *after* the bankruptcy, as alleged in the declaration; the conversion which was complete by the sale having taken place before the bankruptcy, and the subsequent demand and refusal being therefore immaterial. His Lordship accordingly directed a nonsuit.

R. V. Richards now moved for a new trial.—The plaintiffs were entitled to a verdict on this declaration, either for the whole of the goods, or at all events for the undivided moiety therein of Marshall, against whom a fiat issued on the 7th of November. The averment in the first count, that the goods were converted *after the bankruptcy*, was wholly immaterial, and was not necessary to be proved. Supposing the bankrupts to have been entitled to the goods in their own right, and the defendants to have converted them either before or after the bankruptcy, the assignees would be equally entitled to recover them in

trover. The count would have been good on special demurrer without this allegation. So, a plea to this count, that the defendants did not convert the goods *after the bankruptcy*, would surely have been bad in substance. The assignees may sue for money had and received, waiving the tort: that shews that their claim is in respect of the right of property of the bankrupt. [*Parke, B.*—You must describe it properly as a *right of action* passing to the assignees, not as *property* passing to them.] Are the assignees, on such an issue as this, bound to prove the bankruptcy? If so, that must be by proving all the proceedings, and it is equally open to the defendants to dispute any part of them under not guilty, as under a plea properly framed for that purpose. [*Parke, B.*—The question is, whether, under this allegation, the plaintiffs do not undertake to prove a conversion of that which is the property of the assignees. It is quite a different description of interest. *Rolfe, B.*—In the one case a release by, or accord and satisfaction to, the bankrupt, would be a good bar, but not in the other.] In substance this is merely an allegation of a conversion of that which before the bankruptcy was the property of the bankrupt.

But, secondly, this point cannot be raised under the plea of not guilty. In *Vernon v. Shipton* (a), it was held that the plaintiff in trover was entitled to a verdict on the plea of not guilty, if a conversion in fact were proved, although it appeared from the evidence that at the time of such conversion the plaintiff had parted with his property in the goods. *Barton v. Brown* (b) is to the same effect. It was sufficient, therefore, in this case, for the plaintiffs to prove a conversion in fact. Again, as the bankrupts clearly were possessed of the goods before the bankruptcy, the plaintiffs were equally entitled to recover upon the second issue.

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(a) 2 M. & W. 9.

(b) 5 M. & W. 298.

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Thirdly, there was no conversion until the demand and refusal by the assignees on the 13th of January. The assignees had a right to waive the tort committed before the bankruptcy, and the demand and refusal was a conversion by election. [Lord *Abinger*, C. B.—A demand and refusal are only evidence of a conversion, which may be rebutted by evidence of a previous conversion in fact.] That would be a good conversion against the bankrupt; but not against the assignees, unless they elect so to consider it. [Lord *Abinger*, C. B.—That would as well apply to goods sold seven years before. *Parke*, B.—You cannot make a demand and refusal a conversion, unless there is at the time a power to give up the goods.]

Lastly, the plaintiffs were entitled to recover on the second count. There was a good fiat on the 7th against one of the bankrupts; the goods belonging to him passed thereby to the plaintiffs, and they are properly laid as being the goods of the plaintiffs as assignees. [*Parke*, B.—But they do not belong to them as assignees of both the bankrupts, which you describe as the legal effect of their title.] The meaning of the averment is, that the goods of both bankrupts or *either* of them were the property of the assignees.

PARKE, B.—I think there is no ground for a rule in this case. The first count of the declaration alleges “that the defendants, well knowing the said goods of right to belong and appertain to the plaintiffs, as assignees as aforesaid, after the said bankruptcy, had not delivered them to the plaintiffs, but, since the said bankruptcy, converted and disposed of them to their own use.” This allegation rendered it essential to prove a conversion *after* the bankruptcy. Before the bankruptcy, the *right of action*, as regards the assignees, dates from the conversion; but here the plaintiffs have undertaken to prove that the *property* in the goods, and not the right of action merely, was vested

in them. The plea of not guilty was the proper one in this case, and under it the plaintiffs were bound to prove a conversion of property that belonged to them at the time, and they have not done so. If the *sale* was the conversion, they were not assignees at that time, and therefore the property was not theirs. But the plaintiffs contend that the demand and refusal in the month of January following constituted the conversion. It is true, that if the goods were in the possession of the defendants, a demand and refusal of them would be evidence of a conversion; but it is not so in a case where the goods have previously been parted with by sale. There cannot be an effectual demand and refusal, unless the party has at the time possession of the goods, and has the means of delivering them up. There is not, therefore, sufficient evidence in this case of a conversion subsequently to the bankruptcy. With respect to the second count, I think the title of the plaintiffs is not correctly described, so as to entitle them to recover a moiety of the goods. The effect of the last commission undoubtedly was to make them assignees of the separate as well as of the joint property; but at the time of the conversion they were assignees of the property of one bankrupt only, whereas the count describes their legal title to be in right of the joint property of both.

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ALDERSON, B., and ROLFE, B., concurred.

LORD ABINGER, C. B.—I adhere to the opinion I expressed at the trial. It is unnecessary to enter at large into the question, my Brother *Parke* having stated so fully the reasons for the decision of the Court. For any injury done to goods which pass to the assignees of a bankrupt, they have redress as owners; but they take also the rights of action which were vested in the bankrupt, in cases where a conversion has taken place before the bankruptcy. Here they undertook to shew, not only that they had the

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right of action, but also that they had the property in the goods; and they failed to prove that allegation. They shewed only a right of action for an injury done to the goods, whereas, in order to support this count, they were bound to shew it to have been done to *their* goods. I think also that the plea of not guilty was the proper answer. With regard to the second point, the plaintiffs allege that the goods of *both* bankrupts were theirs at the time of the conversion; that averment was not proved, for at the time of the conversion they were assignees of one bankrupt only.

Rule refused.

April 22.

WILLSON v. CAREY and CUNNINGTON.

The plaintiff, an auctioneer, was employed to sell certain lands of the two defendants. One of the defendants, without the plaintiff's knowledge, employed H. to bid for one of the lots, in order to raise the price, and the plaintiff knocked down the lot to H. The plaintiff then sold two other lots belonging to different persons, and at the close of the entire day's sale demanded the auction-duty from H., who refused to pay it. The conditions of sale stated, that the auction-duty was to be paid by the purchaser "immediately after the sale."

DEBT. The declaration stated, that whereas after the passing of the stat. 19 Geo. 3, c. 56, the plaintiff, being an auctioneer, and employed as such by the defendants, put up to sale and sold certain lands &c., and amongst other lots, lot 4, subject to a certain condition of sale, that the highest bidder should be the purchaser. Averments, that on the said exposure to sale thereof, one Joseph Hames became and was the highest bidder for the said lot, and was declared the purchaser thereof from the plaintiff as such auctioneer as aforesaid; by reason whereof, certain auction-duty upon the purchase-money of the said lot, amounting to the sum of 94*l.* 18*s.* 9*d.*, became and was payable to her Majesty; that after the said sale, the plaintiff, as such

Held, first, that, in an action by the auctioneer against the defendants for the amount of the auction-duty, H. was to be considered as the highest bidder; secondly, that there was a valid demand of the duty from H.

auctioneer, delivered an account of the said lot so sold as aforesaid to the collector of excise, &c.; whereby, and by force of the statute &c., the defendants became and were liable to pay to the plaintiff the sum of 94*l.* 18*s.* 9*d.* Breach, nonpayment of that sum.

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The defendant Carey pleaded (*inter alia*), secondly, that the said Joseph Hames was not the highest bidder for and did not become the purchaser of the said lot, in manner and form &c.: on which issue was joined. Thirdly, that it was one of the conditions of sale, that the purchaser should immediately after the sale pay the auction-duty upon the purchase-money: yet the plaintiff, not regarding his duty as such auctioneer, did not demand payment of the said auction-duty from the said Joseph Hames, according to the form and effect of the statute, but at the time of the said bidding wholly neglected, and hath hitherto wholly neglected, so to do.—Verification.

Replication to the third plea; that the plaintiff did demand payment of the said auction-duty from the said Joseph Hames, according to the form and effect of the statute: on which also issue was joined (*a*).

The other defendant, Cunningham, suffered judgment by default.

At the trial before *Alderson*, B., at the last assizes at Lincoln, it appeared that the two defendants were partners, and jointly interested in the lands put up to auction by the plaintiff. The defendant Cunningham, without the knowledge of the plaintiff, engaged Hames to make an advance of £100 upon a bidding of £3000 for lot 4, with a view to raise the price; and the lot was knocked down to Hames, upon that bidding, for £3100. The auctioneer then sold two other lots, belonging to dif-

(a) There was a fourth plea, to judgment thereon for the plaintiff which there was a demurrer, and 10 M. & W. 841.

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ferent owners, and after the end of the entire day's sale, demanded the auction-duty from Hames, who refused to pay it, alleging that he had bid for Cunningham, not for himself. One of the conditions of sale, which were read by the plaintiff, was that the auction-duty was to be paid by the purchaser immediately after the sale. Upon these facts it was contended for the defendant, that both the above issues ought to be found for him; for that, first, Hames, being a mere agent bidding for the owner of the land, was not to be considered the highest bidder; and secondly, the auction-duty was not legally demanded, the demand not having been made at the conclusion of the biddings for lot 4, but at the close of the day's sale. The learned Judge overruled the objections, and directed a verdict for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him on the above issues.

Clarke, Serjt., now moved accordingly.—First, the auction-duty was not legally demanded. The stat. 17 Geo. 3, c. 50, s. 8, directs, that in case it is made a condition of sale that the auction-duty shall be paid by the purchaser, the auctioneer is to demand payment of it, and that “upon neglect or refusal to pay the same, *such bidding* shall be null and void to all intents and purposes.” To satisfy this act, the demand ought to have been made at the close of the bidding for lot 4, and not delayed till the end of the day's business; the object of the act being, that in case of nonpayment the parties should not be too late to enforce the previous bidding. Secondly, Hames, being the mere agent of Cunningham, who could not repudiate his act, ought not to have been treated as the highest bidder or the purchaser.

Lord ABINGER, C. B.—I think there is no ground for a

rule. In the first place, under all the circumstances, Hames was to be considered as the highest bidder. In the second place, I think the auctioneer was not bound to demand the duty at the close of the particular bidding.

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PARKE, B.—I am of the same opinion. The first question depends upon the construction of the conditions of sale. The auctioneer might, no doubt, have stipulated for the payment of the duty by the purchaser of each lot at the close of the particular bidding; but it is sufficient for the decision of this case to say that no such agreement appears by the conditions to have been made here. Secondly, I think Hames is to be considered as having been the highest bidder, for the purposes of this declaration. The plaintiff was in no fault; he did all that was required of him, and did not know that Hames was bidding merely as the agent of Cunningham.

ALDERSON, B.—I am of the same opinion. I think that, as against the defendants, Hames must be considered as the highest bidder, and that, having bid with a view to advance the sale, it is not competent for them to say that he was the mere agent of Cunningham. I agree also with the rest of the Court on the other point.

ROLFE, B., concurred.

Rule refused.

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April 22.

B., the plaintiff's agent at Sunderland, having occasion to remit money to the plaintiff, paid the amount into the defendant's bank at Sunderland, and received a bill of exchange indorsed by the defendant, which he, B., indorsed and transmitted to the plaintiff. The bill fell due on Saturday, Oct. 31st, and was dishonoured. On that day the plaintiff wrote to B. a letter, which B. received on the Monday, containing the following:—
"I have also to apprise you, that the draft for 33*l.* 14*s.*, due the 1st November [Sunday], has been duly presented this day and returned dishonoured; probably it may be up on Monday; it is drawn on P. & Co.; it will be proper to advise the drawers, in case the acceptor do not remit." On the Wednesday following, B. gave notice to the defendant of the dishonour:—*Held*, too late.
The holder of a bill of exchange need not inform a party, to whom he gives notice of its dishonour, that he looks to him for payment.

MIERS v. BROWN, Public Officer, &c.

ASSUMPSIT by the plaintiff, as indorsee, against the defendant (sued as public officer of the Sunderland Joint Stock Banking Company) as indorser, of a bill of exchange for 33*l.* 14*s.*, dated 29th July, 1840, drawn by J. & W. Glaholm, indorsed by them to the Banking Company, who indorsed the same to the plaintiff.

The defendant pleaded (*inter alia*), that the company had not due notice of the presentment and nonpayment of the bill: on which issue was joined.

At the trial before *Rolfe*, B., at the last Northumberland Assizes, it appeared that one Barker, who was the plaintiff's agent at Sunderland for the sale of his goods, having occasion to remit some money to the plaintiff, paid it into the bank of the Sunderland Banking Company, and received from them the bill in question, which he indorsed and transmitted to the plaintiff. The bill was dishonoured by the acceptor when it became due; and on the same day (Saturday, October 31st, 1840) the plaintiff wrote by post as follows to Barker:—

"I have also to apprise you, that the draft for 33*l.* 14*s.*, due on the 1st of November [Sunday], has been presented this day, and returned dishonoured; probably it may be up by Monday; it is drawn upon Punshon, Metcalfe, & Hayton: it will be proper to advise J. & W. Glaholm, the drawers, in case the acceptors do not remit."

This letter was received by Barker on the Monday morning; and on the morning of Wednesday, the 4th of November, Barker received by post the following letter from the plaintiff:—

"I have again presented the bill for £33 14s. at Messrs. Barnett, Hoares, & Co., but they have yet no order for payment; shall therefore feel obliged by your reply, informing me whether you will have the bill returned, or have the order for payment forwarded to me, and again present it for payment."

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At eleven o'clock on the morning of the same day, (Wednesday), Barker gave the defendant notice of the dishonour of the bill.

It was contended for the defendant, upon these facts, that the notice given to him was too late; that as Barker had received, on the Monday, notice of the bill having been dishonoured upon the Saturday, he ought to have communicated that fact to the defendant earlier than on the Wednesday: and the learned Judge, being of that opinion, directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict for the amount of the bill.

Knowles now moved accordingly, and contended that inasmuch as the letter received by Barker on the Monday was not a legal notice to him of the dishonour of the bill, with a view to hold him liable upon it, but was merely given for his information as the agent of the plaintiff, it did not bind him to give immediate notice of the dishonour to the defendant.

PARKE, B.—I think that Barker received on the Monday sufficient notice of the dishonour of the bill, and ought on that day to have communicated it to the defendant. It has lately been decided in the Court of Queen's Bench (a), that the holder of a bill of exchange need not in terms inform the party to whom he gives notice of its dishonour, that he looks to him for payment. In the present case,

(a) *Furze v. Sharwood*, 2 Q. B. 388; 2 G. & D. 116: *King v. Bickley*, 2 Q. B. 419.

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Barker would have been responsible if no other notice had been given him. The effect of the plaintiff's letter is merely this, that he gives Barker notice of the dishonour, but at the same time intimates that it may be unnecessary for him to act upon it, as the bill may perhaps be paid by the acceptor on the Monday. Barker ought to have given the defendant notice on the Monday.

ALDERSON, B.—I am of the same opinion. Knowledge of the dishonour, obtained from a communication by the holder of the bill, amounts to notice.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

May 2.

ORIDGE v. SHERBORNE.

A promissory note payable by instalments is assignable within the stat. 3 & 4 Ann. c. 9; and the maker is entitled to the days of grace upon the falling due of each instalment.

ASSUMPSIT by indorsee against payee of a promissory note, dated 19th November, 1838, payable to the defendant by instalments on the 19th of November in each succeeding year, for seven years. This action was brought to recover the amount of the instalment due on the 19th of November, 1842. There were pleas denying that the note was duly presented for payment, or that the defendant had due notice of the presentment and dishonour. At the trial before Rolfe, B., at the Middlesex sittings after Hilary term, it appeared that the note was presented for payment of the instalment in question on the 22nd of November, the plaintiff thus allowing the three days of grace usually given in the case of negotiable instruments: it was dishonoured, and notice of the dishonour was given to the defendant the next day. It was objected for the defendant, that the presentment and notice of dishonour were too

late; that a promissory note payable by instalments was not a negotiable instrument within the law and custom of merchants, and the maker thereof was not entitled to days of grace at all; or if he were, they could be allowed only for payment of the last instalment. The learned Judge overruled the objection, and the plaintiff obtained a verdict.

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In this term, *Knowles* obtained a rule nisi for a new trial, on the above ground: against which

R. V. Richards and *Whitehurst* now shewed cause.—A promissory note payable by instalments was a valid security before the stat. of 3 & 4 Ann. c. 9, and it is negotiable by virtue of that statute. A promissory note was always evidence of money lent, whether payable by instalments or otherwise, as admitting a debt payable at the day when it was to become due. The difficulty was, that the promisee could not declare upon the note itself for want of consideration apparent on the face of it, not being an instrument within the law and custom of merchants. In consequence of that difficulty the statute of Anne was passed, which, being made for the advancement of trade, has always received a liberal construction. *Rawlinson v. Stone* (a), *Milne v. Graham* (b). Its language is as large and comprehensive as possible, and the effect of it is to place *all* promissory notes upon the same footing in every respect as inland bills of exchange, and to invest them with all the incidents which by the law merchant appertained to such instruments. There is nothing whatever in the statute from which it can at all be inferred that promissory notes payable by instalments were not intended by the legislature to be included within its provisions: and although there is no express authority that promissory notes may be made payable by instalments, and be negotiable,

(a) 3 Wils. 1.

(b) 1 B. & Cr. 192; 2 D. & R. 293.

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there are many cases in which that is assumed to be the law. Thus, in *Siddall v. Rawcliffe* (a), *Bayley, B.*, says—
“If you had taken a note payable by instalments, you might have sued as those instalments became due.” thus treating it as a matter clearly understood that it is a valid instrument within the statute. Numerous actions upon such notes are to be found in the books, and no trace of such an objection as the present appears in any of them. In *Rudder v. Price* (b), for instance, it would have been idle to discuss the question whether and when *debt* could lie on a note payable by instalments, if the objection now taken were of any weight. See also *Ashford v. Hand* (c), *Donaldson v. Thompson* (d), *Davies v. Wilkinson* (e), *Hatch v. Trayes* (f). Again, the various treatises on the subject of bills of exchange and promissory notes, while pointing out every conceivable objection to the validity and form of such instruments, contain no suggestion whatever of this. And the legislature itself has recognised notes payable by instalments as valid instruments, by providing for the manner in which they shall be stamped. 55 Geo. 3, c. 184, sched. pt. 1. If, then, such notes are within the statute of Anne, it is a question of minor consideration whether days of grace are to be allowed upon them. If not, the presentment is an immaterial allegation. But how can one part of the custom of merchants be applied to them, and not the other? Notice is necessary only by the custom of merchants; and so also they are equally within the other custom, as to the time of presentment. Bills of exchange, it is true, are not often so drawn; but what can be the objection to it, either in reason or in law? Why may not a man put several sums payable at different times into one bill, just as well as he may draw separate bills at different dates for the several parts of the aggregate amount? It is

(a) 1 C. & M. 490.

(b) 1 H. Bl. 547.

(c) Andr. 370.

(d) 6 M. & W. 316.

(e) 10 Ad. & E. 98; 2 P. & D. 256.

(f) 11 Ad. & E. 702; 3 P. & D. 408.

said, what is the acceptor to do, because on payment he is entitled to have the instrument delivered up? The answer is, he has chosen to enter into such a contract, and must be bound by it. But further, the drawer of a bill may direct a special manner of payment: Com. Dig. Merchant, F. 5: so, a payee may indorse conditionally; or for a part, before acceptance: *Robertson v. Kensington (a)*, *Hawkins v. Cardee (b)*. In *Josselyn v. Lacier (c)*, a bill payable by instalments was held to be within the statute of Anne. If a party may accept for different parts of a bill, why may he not draw it payable at different periods? In the present case, the whole sum is not made payable on default in payment of one instalment, but each instalment is treated as a separate security, and the law merchant is applicable to each. *Brown v. Harraden (d)* shews that days of grace are to be allowed on promissory notes in the same manner as on bills of exchange.

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Knowles, in support of the rule.—There is undoubtedly no express authority upon this subject; and none of the cases which have been cited are really in point. The question must no doubt be decided by analogy to the rule which obtains in respect of bills of exchange; and if days of grace are to be allowed upon bills of exchange payable by instalments, as each instalment becomes due, then the ruling in this case was correct. But it is submitted that a bill of exchange is negotiable within the law merchant, only when it is specified to be for the payment of one definite sum at a definite time. A bill of exchange payable by instalments is in truth unknown amongst merchants. [*Parke*, B.—The knowledge or practice of merchants may

(a) 4 Taunt. 30.

(b) 1 Salk. 65.

(c) 10 Mod. 294; cited 2 Ld.

Raym. 1362, and Stra. 219, 762.

(d) 4 T. R. 148.

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be a very different thing from the general law merchant.] Neither are such bills mentioned in any of the treatises upon the law merchant. It is plain that such instruments would much perplex the transactions of the mercantile community, and certainly the invariable practice is to draw separate bills at several dates. If such instruments as these are permitted to be negotiable, great inconvenience must be the consequence. The different instalments may be indorsed to different persons, and some of them may be paid when due and some not, and as the party who pays a bill or note is entitled to have it delivered up to him, great difficulty would thus be thrown in the way of the parties seeking to recover subsequent unpaid amounts. [*Parke, B.*—A bill of exchange may be *accepted* for part, but not *indorsed* for part. This note is one entire contract to pay a definite sum at different times.] But, further, *when* are the days of grace to be allowed? If at all, surely not until the last instalment becomes due, for until then the note is running.

PARKE, B.—I think the rule in this case ought to be discharged. The question is, whether, on a promissory note payable by instalments, the usual three days of grace are to be allowed or not. In order to determine this point, the first question that presents itself is, whether such an instrument is a promissory note at all, within the stat. 3 & 4 Ann. c. 9, so as to entitle any party into whose hands it may come to sue upon it; for if so, there will be no difficulty in extending to it the same rule as prevails in the case of bills of exchange; namely, that days of grace are to be allowed in all cases where a sum of money is by such a negotiable instrument made payable at a fixed day. Now, in order to render this valid as a promissory note, we must first consider whether it might be sued on by the original parties to it. It is well known that, before the passing of the stat. 3 & 4 Ann. c. 9, it was the opinion of Lord *Holt*

that a promissory note was only *evidence* of a debt, and not an instrument of obligatory force in itself. Then came the statute, which puts promissory notes on the footing of inland bills of exchange. The preamble recites, that it had been held "that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person or his order any sum of money therein mentioned, are not assignable or indorsable over, within the custom of merchants, to any other person; and that such person to whom the sum of money mentioned in such note is payable cannot maintain an action by the custom of merchants against the person who first made and signed the same; and that any person to whom such note should be assigned, indorsed, or made payable could not, within the said custom of merchants, maintain an action against the person who first drew and signed the same." The statute is thus directed to two grievances—that the note is not assignable, and that it is not the subject of an action. Therefore, "to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange," the statute in the 1st section goes on to enact, that "all notes in writing, whereby any person, body politic or corporate, shall promise to pay to any other person or persons, body politic or corporate, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons, &c. to whom the same is made payable." These words are general, and without any limitation as to the *mode* in which the money is to be paid. The section goes on to enact, that "every such note shall be made assignable or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants; and that the person or persons, &c., to whom any such sum of money shall be by such note made payable, may maintain an action for the same, in

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such manner as they might do upon any inland bill of exchange made or drawn according to the custom of merchants, against the person or persons who signed the same; and that any person or persons, body politic or corporate, to whom such note is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, may maintain their action for such sum of money either against the person &c. who signed such note, or against any of the persons who indorsed the same, in like manner as in cases of inland bills of exchange." On the provisions of this statute, therefore, we find no limitation imposed as to the manner in which the money is to be made payable; and consequently, unless there is some established rule or settled practice to the contrary, a promissory note must be deemed good within the statute, whether it be to pay an entire sum at once, or to pay it by instalments. No case has been cited to shew that a promissory note in the latter form is not good, and we must therefore look at the course pursued in practice since the statute. Speaking from modern experience, (and mine in this respect has been of some standing), I have no doubt that numerous actions have been brought by the original parties in whose favour such notes have been made; indeed, that this is so every gentleman in the habit of drawing under the bar can testify; and it is now much too late to say such actions as those are not maintainable. And if promissory notes are within the first clause of the statute, I see no sufficient reason why they should not also be within the second, and consequently assignable to an indorsee. Besides the invariable practice on this subject, and the fact that actions on notes of this kind have been so numerous, that it is, I may say, impossible that the present objection should not have been taken in some of them, if there were really any weight in it, several reported cases have been referred to, in which such actions were brought, and no objection

taken that they would not lie on the ground suggested in this case, although other objections *were* taken. One is that of *Donaldson v. Thompson*, to which may be added those of *Ashford v. Hand* and *Josselyn v. Lacier*. If there had ever been any idea that a promissory note of this nature was not within the statute of Anne, the objection would certainly have been taken; although I rely more on the established modern usage, and think it too late to raise this objection now. If, then, this is admitted to be a promissory note, suable on and indorsable under the statute, the next question is respecting the allowance of the usual days of grace upon it. Now, in the case of *Brown v. Harraden*, it is said, that, with respect to the allowance of days of grace, the rule is exactly the same in the case of a promissory note as of a bill of exchange; namely, that they are always to be allowed, when the instrument is for the payment of money at a certain time, as after a certain number of days or after sight, but not when it is only payable on demand. That rule we must adopt in this case; and as this note is suable on and indorsable under the statute of Anne in the same manner as bills of exchange were before,—as both instruments are thereby simply put upon the same footing,—the days of grace for both must be the same, and consequently ought to be allowed on this promissory note.

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ALDERSON, B.—I am of the same opinion. Notes of this nature are within the literal words of the statute of Anne; and when we are called upon to decide whether they are *virtually* within it, we ought to look to the invariable practice which has existed in such cases. My Brother *Parke* has referred to the modern practice on this subject, in which he has had great experience; then we have the fact, that the intermediate parties to promissory notes in this form have sued upon them, and that there is a number of

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decided cases in which the declarations would have been bad if this objection had prevailed. Again, if we look at the Stamp Act, we shall find that the legislature itself has taken a similar view of this matter, and treated instruments in this form as negotiable, by imposing a stamp duty upon them. We thus have the opinion of those persons who have all along been employed in drawing declarations, and the opinion of the legislature itself; and in addition to all these, we have impliedly the concurrence of Mr. Baron *Bayley*, a great authority in questions of this nature, who, in his work on Bills of Exchange, when speaking of the requisites necessary to constitute a good bill, mentions every other objection which can be raised, but makes no exception of such as are made payable by instalments; which would certainly have been a very great omission, if the present objection be well founded. The same observation may be made as to other text-books which treat on this subject. Taking, then, all these matters together, they seem to establish that *communis consensus*, which we are told *facit jus*, of all persons to adopt the literal construction of the statute of Anne, and which ought on this account to prevail with us in the present case. If, then, a promissory note payable by instalments be within that statute at all, it must be so to the whole extent of the statute; so that not only may the original parties to the note sue upon it, but so also may all collateral parties, the instrument being indorsable like any bill of exchange, and subject to the incidents of such indorsement. The only question in the present case, therefore, being that relative to the days of grace on this note, on which we think the decision at the trial was correct, the present rule must be discharged.

ROLFE, B.—I am of the same opinion. It appears to me that the case which has been referred to, of *Donaldson*

v. Thompson, is almost a direct decision on this point, for that was an action by the indorser of a promissory note, payable by instalments, against the maker, to which the defendant pleaded non assumpsit; and the question raised on demurrer was, whether the declaration, which was somewhat peculiar in its form, was a declaration on a promissory note, within the meaning of the Reg. Gen. H. 4 Will. 4, Assumpsit, 2, which renders that form of plea inadmissible in all actions on bills of exchange and promissory notes. The defendant contended that it was; and although the point was argued by very learned counsel, who made use of numerous arguments to shew that the instrument there declared on was not a promissory note, they never suggested the objection raised here, that it was not a promissory note because made payable by instalments; and the Court held that it did amount to a promissory note within the meaning of the rule. It is impossible to give effect to the argument of Mr. *Knowles* in the present case, without saying that the decision of the Court in that case was erroneous.

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Rule discharged.

THE BANK OF IRELAND *v.* ARCHER and DALY.

May 2.

ASSUMPSIT on a foreign bill of exchange.—The declaration stated, that heretofore, to wit, on the 29th day of September, 1842, in parts beyond the seas, to wit, at Waterford, in the kingdom of Ireland, certain persons using the name, style, and firm of J. & C. Scroder, by their said name, style, and firm, made their bill of exchange in writing, and directed the same to the defendants, and thereby required the defendants to pay to the order of them the said J. & C. Scroder the sum of £852

A promise to accept a bill not yet drawn does not amount to an acceptance of it; although the bill be discounted for the drawer on the faith of such promise.

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10s. sterling, three months after the date thereof, which period had elapsed before the commencement of the suit; and the defendants then accepted the said bill, and the said J. & C. Scroder then indorsed the same to the plaintiffs; of all which the defendants then had notice, and then promised the plaintiffs to pay them the amount of the said bill, according to the tenor and effect thereof and of their said acceptance thereof, but the defendants did not pay the same when due. The second count stated, that theretofore, to wit, on the day and year last aforesaid, in consideration that the plaintiffs, at the request of the defendants, would discount a certain other bill of exchange before then drawn by certain persons using the name, style, and firm of J. & C. Scroder, by their said name, style, and firm, whereby the said J. & C. Scroder required the defendants to pay to their order, three months after the date thereof, the sum of £852 10s. sterling, and would pay to the said J. & C. Scroder the amount of the said last-mentioned bill of exchange, deducting certain reasonable discount in that behalf, in and by certain other bills of exchange indorsed by the plaintiffs, they the defendants promised the plaintiffs to accept the said bill of exchange in this count first mentioned, upon the same being presented to them for their acceptance thereof. The count then averred, that the plaintiffs afterwards, to wit, on the 2nd October, 1842, confiding in the said promise of the defendants, discounted the said bill of exchange in this count first mentioned, and then paid to the said J. & C. Scroder, in certain other bills of exchange indorsed by the said plaintiffs, the amount of the said bill in this count first mentioned, after deducting such reasonable discount as aforesaid, being a large amount, to wit, the sum of £847 2s.; and although the said J. & C. Scroder, to wit, then indorsed the said bill of exchange in this count first mentioned to the plaintiffs, and the plaintiffs after-

wards, and within a reasonable time in that behalf, to wit, on the 10th day of October in the year aforesaid, presented the said last-mentioned bill of exchange to the defendants for their acceptance thereof, and then requested the defendants to accept the same, according to their said promise in that behalf, yet the defendants did not nor would, when the said last-mentioned bill of exchange was so presented to them for their acceptance as aforesaid, and when they were so as aforesaid requested to accept the same, or at any other time, accept the said last-mentioned bill of exchange, but then and always thereafter wholly neglected and refused so to do, and thereby the plaintiffs have wholly lost the said sum of money so advanced by them as aforesaid, and the said bill of exchange is still wholly unpaid to the plaintiffs.

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The declaration contained also counts for money had and received, money paid, and on an account stated.

The defendants pleaded to the first count, that they did not accept the said bill of exchange therein mentioned; to the second count, first, that they did not promise to accept the said bill; secondly, a traverse of the consideration alleged; and thirdly, that the plaintiffs did not discount the said bill of exchange; and to the residue of the declaration, *non assumpserunt*. Issues thereon.

At the trial, before *Coltman, J.*, at the last Assizes at Liverpool, it appeared that the action was brought by the plaintiffs to recover from the defendants, who were corn-merchants and commission agents at Liverpool, the amount of the bill mentioned in the declaration, under the following circumstances. On the 8th of July, 1842, Messrs. J. & C. Scroder, who were corn-merchants at Waterford, and correspondents of the defendants, drew a bill of exchange for £850, at three months' date, on the defendants, and discounted it, before acceptance, at the Branch Bank of Ireland at Waterford. The defendants had then in

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their possession at Liverpool, for sale on commission, a quantity of Indian corn belonging to Messrs. Scroder; and on the bill being presented to them at Liverpool, it was duly accepted. In the following September, the defendant Daly, being at Waterford, had an interview with one of the Messrs. Scroder, who told him they should find some difficulty in providing for the bill on its falling due, (which would be on the 11th of October), but that if the defendants would renew their acceptance, he thought he could get it discounted. Daly declined to do so without a deposit in cash, on the ground of the bad state of the markets, and the loss they were likely to sustain by the Indian corn. To this Scroder agreed, and thereupon Daly, being requested to accept another bill for £852 10s., said—"Send it for acceptance as usual, remitting proceeds at the same time, and I will advise my partner in Liverpool of the amount." Accordingly, on the 29th of September, Messrs. Scroder drew on the defendants the bill in question, for £852 10s., and got it discounted, before acceptance, at the same bank. The manager of the bank stated that he was induced to discount the bill upon the representation of Messrs. Scroder that they had arranged with the defendants for the acceptance of it. On the same 29th of September, the following letter was written and sent by Messrs. Scroder to the defendants:—

"Gentlemen—Agreeably to our arrangement with Mr. Daly, please take the inclosed Bank of Ireland indorsements, £847 0s. 2d., being as near as we could go to the amount of your bill, £850, due 11th of next month. We have drawn on you at three months from to-day, £852 10s., favour of the Bank of Ireland, which please protect, hoping that before its maturity you may be able to sell our stuff at a fair price.

"J. & C. SCRODER."

In answer to which the following letter was received by the Messrs. Scroder, on the 1st of October :—

“ Gentlemen—Your favour, inclosing bills amounting to £847 0s. 2d., is received and passed to your credit. Your draft on us for £852 10s. shall be duly honoured. We have no inquiry at present for Indian corn.

P. Pro. Archer, Daly, & Co.,
P. J. FOREST.”

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Forest, however, had no authority to accept, and never had accepted, bills of exchange on behalf of the defendants; and they refused to accept the bill when presented to them, Messrs. Scroder having in the meantime stopped payment.

Upon these facts, it was objected for the defendants, and the learned Judge was of opinion, that inasmuch as there was no bill in existence when the promise to accept it was made by the defendant Daly, that promise did not amount to an acceptance, or render the defendants liable, although the plaintiffs had discounted the bill on the faith of their acceptance: and a verdict was accordingly taken for the defendants on the first issue, leave being reserved to the plaintiffs to move to enter a verdict for them for £852 10s. if the Court should be of a contrary opinion.

On the 25th April,

Knowles moved accordingly.—The question which arises in this case is, whether a parol promise to accept a bill of exchange afterwards drawn, on the faith of which promise the bill is discounted, amounts in law to an acceptance. The case of *Pillans v. Van Mierop* (a) is in effect a decision that it does. The opinion expressed by Lord *Kenyon* in *Johnson v. Collings* (b) is undoubtedly to the contrary: but in that case it did not in fact appear that any third person was induced by the promise to discount the bill. In *Miln*

(a) 3 Burr. 1663.

(b) 1 East, 98.

Exch. of Pleas, v. Prest (a), Gibbs, C. J., laid it down that a conditional
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acceptance is as effectual as an absolute one, if the condition be complied with. This, however, was an absolute promise, and *could* not be repudiated, any more than in *Pillans v. Van Mierop*. The rule of law in America appears to be more comprehensive than would seem to result from the case of *Johnson v. Collings*. Mr. Justice Story says (*b*), after remarking on the English cases—"The rule, as formerly held, always included the qualification, that the paper containing the promise should describe the bill to be drawn in terms not to be mistaken, so as to identify and distinguish it from all others; that the bill should be drawn within a reasonable time after the paper was written; and that it should be received, by the person taking it, upon the faith of the promised acceptance. . . . Under these qualifications, the rule seems to be firmly established in America upon the footing of the old authorities." All the requisites represented here as being necessary to constitute an acceptance appear to concur in this case. [*Parke, B.*—I thought this point had been settled by *Johnson v. Collings*. Your proposition would lead to an extraordinary state of things: namely, that if the indorsee paid the bill away with notice of the promise to accept, the indorsee might recover against the acceptor, but if not, not; and so there might be several indorsees with different remedies. We will take a short time to look into Mr. Justice Story's work: as far as the English authorities are concerned, I have always understood the point was conclusively settled by *Johnson v. Collings*. It is a question of the law merchant, and must depend on the authorities.]

Cur. adv. vult.

The judgment of the Court was now delivered by

(*a*) Holt, N. P. C. 181; 4
Campb. 393.

(*b*) Story on Bills of Exchange,
s. 249, p. 274.

PARKER, B.—The point reserved by my Brother *Collman* in this case was, whether a parol promise to accept a foreign bill of exchange before it was drawn, amounted to an acceptance, such promise having been communicated to the indorsees, the plaintiffs, and the bill having been taken by them on the faith of it. The learned Judge thought not; and we agree in this opinion, and think there should be no rule.

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The case of *Pillans v. Van Mierop* appears to be the authority on which the doctrine, that a person can be bound by a promise to accept a future bill, is rested. It is not quite clear from the report of that case, on what ground the defendant was held liable to the plaintiffs, the drawers; whether on his special contract with them to accept, or as actual acceptor. Some of the Judges rest his liability on the ground of special contract, considering that the doctrine of nudum pactum does not apply to written or to mercantile contracts; a doctrine which is now entirely exploded. Mr. Justice *Yates*, as well as Lord *Mansfield*, expresses an opinion that he was liable, on the authority of the cases which laid it down that an acceptance need not be on the bill itself; not advertng to the distinction between existing and non-existing bills. In Beawes' *Lex Mercatoria*, p. 466, pl. 112, a promise to accept is apparently put on the ground of a contract, for a breach of which an action lies, and not as being an actual acceptance. In *Pierson v. Dunlop* (a), the supposed rule, that a promise to honour was equivalent to an acceptance, was qualified by Lord *Mansfield*; and he said that it was not, unless accompanied with circumstances which might induce a third person to take the bill by indorsement; if there were such circumstances, it might amount to an acceptance, though the answer were contained in a letter to the drawer. His Lordship was then speaking of a promise to honour

(a) Cowp. 571.

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an existing bill; a doctrine which is not now disputed, the case of *Wynne v. Raikes* (a) having established that a promise to the drawer, after a bill is drawn, operates as an acceptance in favour of an indorsee, such promise having not only been communicated to him, but made long after the indorsement. In this state of the authorities, it was not surprising that the case of *Johnson v. Collings* decided that a promise to accept a non-existing bill was no acceptance. Mr. Justice *Le Blanc* alludes to the qualification by Lord *Mansfield* of the previous doctrine, and supposes it to be meant to apply to non-existing bills only; which is inaccurate: and Lord *Kenyon* expresses what may be termed a strong opinion, that such a promise would not amount to an acceptance, even with the qualification that the bill is taken on the faith of it.

This opinion, we believe, has been generally acquiesced in, and the doctrine is reasonable, simple, and convenient. For reason points out that, in order to constitute an acceptance, there ought to be a bill in existence which could be accepted; and to hold that the same act would be an acceptance or not, according to the subsequent contingency of the holder of the bill having notice of it, would introduce a strange anomaly and confusion into the relation of the parties to the bill, the drawee being an acceptor as to some and not as to other indorsees. No subsequent case appears to have cast any doubt upon the propriety of Lord *Kenyon's* dictum. That of Lord Chief Justice *Gibbs*, in the case of *Mila v. Prest*, which was quoted in support of this application, amounts, according to the report in 4 Campb. 898, merely to this, that the authority of *Johnson v. Collings* was directly in point, there being no evidence of any communication to the plaintiff of the promise to accept. The report in Holt's *Nisi Prius Cases* is evidently inaccurate.

(a) 5 East, 514.

It is said, however, that in America the rule is otherwise; and if it had appeared from the decisions in other countries, that this was a part of the law merchant, we should have given due weight to them. In different countries, however, a different rule seems to prevail; and even in America, it appears, from Mr. Justice Story's book on Bills of Exchange, s. 249, p. 275, that in order to constitute an acceptance, the promise is required to be in writing, describing the bill to be drawn in terms not to be mistaken, so as to identify it, and distinguish it from all others, and that the bill should be drawn in a reasonable time afterwards;—circumstances which do not occur in this case.

We are of opinion that the question raised in this case does not admit of such a degree of doubt as to require further discussion; and therefore refuse the rule.

Rule refused.

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BIRLEY and Others v. The INHABITANTS OF THE HUNDRED
OF SALFORD.

May 4.

THIS was an action on the case, brought by the plaintiffs, cotton spinners at Manchester, to recover compensation. The 7 & 8 G. 4, c. 31, s. 2, renders the hundred in

which the offence of felonious demolition by a riotous mob is committed, liable to make compensation to the injured party. By s. 7, the required sum or sums of money are to be raised upon the hundred against which such action shall have been brought, over and above the general rate to be paid by such hundred in common with the rest of the county. S. 12 provides for cases where the offence is committed in a place which does not contribute to the county rate at all, or contributes thereto, but not as being part of any hundred. By the 5 & 6 Will. 4, c. 76, s. 112, boroughs to which courts of sessions of the peace are given, are not to contribute at all to the county rate, except as thereafter provided. By s. 113, boroughs are to pay the expenses of prosecutions at the assizes for offences within the borough; and by s. 117, they are also to pay a proportion of other county expenses.

In an action against the hundred of Salford, to recover compensation for injury done by a riotous mob to premises within the borough of Manchester, which formed part of the hundred of Salford:—*Held*, that the action was properly brought against the hundred, and that the borough was liable as part of the hundred, although it came within the provisions of the 5 & 6 Will. 4, c. 76, s. 112.

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tion for a felonious demolition of their premises by a riotous mob, under the stat. 7 & 8 Geo. 4, c. 81, s. 2.

The defendants pleaded, first, that the premises of the plaintiffs were not situate in the hundred of Salford: secondly, that the persons in the declaration mentioned did not unlawfully and feloniously begin to demolish &c., modo et formâ: thirdly, that before and at the time of the committing of the offence in the declaration mentioned, the borough of Manchester was and is a borough, town, and place comprised within the boundaries of the townships of Manchester, Charlton-upon-Medlock, Hulme, Ardwick, Beswick, and Cheetham, in the county of Lancaster, the inhabitants whereof had been and were, before the committing of the said offence &c., and after the passing of the 5 & 6 Will. 4, c. 76, in due form of law erected and constituted by her Majesty, by the advice of her Privy Council, by a certain charter of incorporation and letters patent under the Great Seal &c., bearing date the 23rd day of October, 1838, into a body politic or corporate, by the name of the mayor, aldermen, and burgesses of the borough of Manchester, in the county of Lancaster; and then, to wit, on &c. accepted the said charter of incorporation: the inhabitant householders of the said town, borough, and district having in due form of law, according to the provisions of the said act of Parliament, and after the passing thereof, to wit, on the 21st day of March, 1838, petitioned her Majesty to grant such charter of incorporation as aforesaid, and the said charter of incorporation having been so granted as aforesaid, in compliance with such petition, and due notice of such petition, and of the time when it pleased her Majesty to order the same to be taken into consideration by her Majesty's Privy Council, having been published in the London Gazette one month and upwards before such petition was so considered, to wit, on the day and year last aforesaid; and afterwards, and

before the committing of the said offence in the declaration mentioned, to wit, on the 1st day of April, 1839, her said Majesty, in compliance with a certain petition of the council of the said borough, theretofore, to wit, on the 1st day of March, 1839, in that behalf presented to her Majesty, and by and with the advice of her said Privy Council, did, by her Majesty's letters patent under the Great Seal, &c., bearing date the day and year last aforesaid, in due form of law, grant unto the said borough that a separate court of quarter sessions of the peace should be thenceforward holden in and for the same borough, according to the provisions of the 5 & 6 Will. 4, c. 76; the said last-mentioned petition setting forth therein all things by the said last-mentioned act of Parliament in that behalf required to be therein set forth, and in all things conforming to the provisions of the said last-mentioned act. And the defendants further say, that afterwards, and within ten days after such grant of a separate court of quarter sessions of the peace to the said borough of Manchester, and long before the committing of the offence in the declaration mentioned, to wit, on the 5th day of April, 1839, the council of the said borough of Manchester sent a copy of the said grant, sealed with the seal of the said borough, to the clerk of the peace of the county of Lancaster, in which the said borough was and is; and the said borough of Manchester thereupon became, and thence hitherto has been and is, wholly free and discharged from contributing to the county rate for the said county, and from the time of the said last-mentioned grant, and long before the committing of the offence in the declaration mentioned, the justices of the peace of the said county of Lancaster have wholly ceased and discontinued to assess the said borough, and have not since the time of such grant hitherto assessed any messuages, lands, tenements, or hereditaments within the said borough to any county rate; and the said borough, and every part thereof, has in fact been, from the time of

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the said grant, and from long before the committing of the said offence in the declaration mentioned, wholly free and discharged from contributing to any county rate otherwise than is in the said last-mentioned act provided, that is to say, out of the borough fund of the said borough, by orders of council of the said borough, made by them for payment of the orders of the treasurer of the said county of Lancaster, from time to time made upon the said council, for such proportion of certain money expended out of the county rate as is by the said last-mentioned act in that behalf provided and required in the case of boroughs having a separate court of quarter sessions of the peace; and the said borough of Manchester was, before and at the time of committing the said offence in the declaration mentioned, and still is, a town and place which did and doth contribute to the payment of the county rate of the said county of Lancaster, to wit, in the manner aforesaid, and not otherwise, but which then did not and doth not contribute to the payment of any county rate as being part of any hundred or other like district. And the defendants further say, that the said buildings, mills, and houses of the plaintiffs in the declaration mentioned, and the roofs, doors, gates, and windows, window-frames and window-shutters, fixtures, machinery, and goods in the declaration mentioned, were, before and at the time of committing the said offence, and still are, in the said borough of Manchester, and the said offence in the declaration mentioned was committed in the said borough of Manchester, the same then being a town and place not contributing at all to the payment of any county rate, and not elsewhere; whereby, and by force of the statute in such case made and provided, the inhabitants of the borough of Manchester, and not the said defendants, became and were liable to yield to the plaintiffs compensation for the said damages by them sustained by reason of the commission of the said offence in the declaration in that behalf mentioned.—Verification.

Replication, that the said borough of Manchester, at the time of committing of the said offence, was, and from thence hitherto hath been, and still is, liable to contribute, and then did and still in fact doth contribute, to the county rate of the said county of Lancaster, as being part of the hundred of Salford, within the same county; without this, that the said borough of Manchester was or is a town or place which did not or doth not contribute to the payment of any county rate, as being part of any hundred or other like district, *modo et formâ*.

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At the trial, before *Collman, J.*, at the Liverpool Spring Assizes, the jury found for the plaintiffs on the first and second issues. Upon the third issue, it was contended on behalf of the defendants, that inasmuch as the premises were situated in Manchester, that borough, and not the hundred, was liable under the statutes 7 & 8 Geo. 4, c. 31, and 5 & 6 Will. 4, c. 76. For the plaintiffs it was insisted, that there was nothing in those acts to exempt the borough from contributing to the county rate for other purposes than those of prosecutions. The learned Judge was of opinion, that the effect of the latter act of Parliament was to release the borough from contribution to the county rate, and directed a verdict for the defendants on the third issue, reserving leave to the plaintiffs to move to enter a verdict for them (a).

(a) The following are the enactments applicable to this case:—

7 & 8 Geo. 4, c. 31, s. 2, provides, that in certain cases the inhabitants of the hundred, &c. shall be liable to yield full compensation for damage feloniously committed by any persons riotously and tumultuously assembled together.

Sect. 7, for the purpose of indemnifying the high constable and county treasurer, enacts, "that the justices of the peace at the next

general or quarter sessions of the peace to be holden for any such riding, county, or division, or any adjournment thereof, shall direct such sum or sums of money as shall have been paid or ordered to be paid by the treasurer, by virtue of any such warrant or order as hereinbefore mentioned, to be raised on the hundred, or other like district, against the inhabitants of which any such action shall have been brought, over and above the

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Knowles, on a former day in this term, obtained a rule nisi accordingly, against which

general rate to be paid by such hundred or district, in common with the rest of the county, riding, or division under the acts relating to the county rates, and such sum or sums shall be raised in the manner directed by those acts, and shall be forthwith paid over to the treasurer."

Sect. 12, enacts, "that where any of the offences in this act mentioned shall be committed in a county of a city or town, or in any such liberty, franchise, city, town, or place, the inhabitants thereof shall be liable to yield compensation in the same manner, and under the same conditions and restrictions in all respects as the inhabitants of the hundred; and everything in this act in anywise relating to a hundred, or to the inhabitants thereof, shall equally apply to every county of a city or town, and to every such liberty, franchise, city, town, and place, and to the inhabitants thereof; and where the justices of the peace of the county, riding, or division are excluded from holding jurisdiction in any such liberty, franchise, city, town or place, in every such case all the powers, authorities, and duties by this act given to or imposed on such justices, shall be exercised and performed by the justices of the peace of the liberty, franchise, city, town, or place in which the offence shall be committed; and where the offence shall be committed in a county of a city or town, all the like powers, authorities, and duties shall be exercised

and performed by the justices of the peace of such county of a city or town; and in every action to be brought or summary claim to be preferred under this act against the inhabitants of a county of a city or town, or of any such liberty, franchise, city, town, or place, the process for appearance in the action, and the notice required in the case of the claim, shall be served upon some one peace officer of such county, liberty, franchise, city, town, or place; and all matters which by this act the high constable of a hundred is authorized or required to do in either of such cases shall be done by the peace officer so served, who shall have the same powers, rights, and remedies, as such high constable has by virtue of this act, and shall be subject to the same liabilities; and shall, notwithstanding the expiration of his office, continue to act for all the purposes of this act, until the termination of all proceedings in and consequent upon such action or claim; but if he shall die before such termination, his successor shall act in his stead."

Sect. 15 enacts, "that all sums, payable either by virtue of any warrant of the sheriff or other officer, or of any order or orders arising out of any action or summary claim against the inhabitants of any county of a city or town, or of any such liberty, franchise, city, town, or place, shall be paid out of the rate (if any) in the nature of a county rate, or out of any fund ap-

Wortley now shewed cause.—The ruling of the learned Judge was correct. The 7th section of the 7 & 8 Geo. 4, *Exch. of Pleas,* 1843.

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plicable to similar purposes, where there is such a rate or fund therein, by the treasurer or other officer having the collection or disbursement of such rate or fund; and where there is no such rate or fund in such county, liberty, franchise, city, town, or place, the same shall be paid out of the rate or fund for the relief of the poor of the particular parish, township, district, or precinct therein, where the offence was committed, by the overseers, or other officers having the collection or disbursement of such last-mentioned rate or fund; and in every such case the warrant and orders shall be directed and delivered to such treasurer, overseers, or other officers respectively, instead of the treasurer of the county, riding, or division, as the case may require."

The 5 & 6 Will. 4, c. 76, s. 112, enacts, "that within ten days after the grant of a separate court of quarter sessions of the peace to any borough, the council of such borough shall send a copy of such grant, sealed with the seal of the borough, to the clerk of the peace of the county in which such borough or any part thereof is situated; and after the grant of such court to any borough, it shall not be lawful for the justices of the peace of any county wherein such borough or part of such borough is situate, to assess any messuages, lands, tenements, or hereditaments within such borough, to any county rate thereafter to be made, but every part of every such borough

shall thenceforward be wholly free and discharged from contributing otherwise than is hereafter provided to any rate or assessment of any kind, of and for the county in which any part of such borough is situated."

Sect. 113 enacts, "that all sums directed to be paid by virtue of the last-recited act, in respect of felonies and such misdemeanors as aforesaid, committed or supposed to have been committed in any borough in which a separate court of quarter sessions of the peace shall be holden, shall be paid out of the borough fund of such borough, anything in the said act contained notwithstanding; and the order of court shall in every such case be directed to the treasurer of such borough, instead of the treasurer of the county."

Sect. 117 enacts, "that the treasurer of every county in England and Wales shall keep an account of all sums of money received in aid or on account of the county rate, and of the sum of money expended out of the county rate for other purposes than the costs arising out of the prosecution, maintenance, and punishment, conveyance, and transport of offenders committed for trial in such county, and in the case of boroughs having a separate court of quarter sessions of the peace other than out of coroners' inquests, and shall, not more than twice in every year, send a copy of the said account to the council of every borough situate within such county in which a se-

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c. 31, provides for payment of damages by the hundred, and the money is to be raised on the hundred, over and above the general rate to be paid by such hundred, in common with the rest of the county, under the acts relating to the county rates, and is to be raised in the manner directed by those acts. The money is therefore to be raised on the hundred, by a rate on the hundred, similar in all respects to a county rate, and over and above the general rate to be paid by the hundred in common with the county. Then section 12 provides for the case of a place which either does not contribute at all to the payment of any county rate, or which does contribute thereto, but not as being part of any hundred. By section 14, when a place contributes to the county rate, but not as part of the hundred, the sum is to be paid by the treasurer of the county, and is to be raised on such place over and above the general rate to be paid in common with the rest of the county. By section 15,

parate court of quarter sessions of the peace shall be holden, and which before the passing of the said act, 2 & 3 Will. 4, c. 64, intituled, 'An act to settle and describe the divisions of counties and the limits of cities and boroughs in England and Wales, so far as respects the election of members to serve in Parliament,' was chargeable with or liable to contribute in whole or in part to the county rate of such county, and shall make an order on the council of every such borough for the payment of such proportion of such sum as would have been chargeable, after deducting all sums of money received in aid of the county rate as aforesaid, if this act had not passed, upon such borough as the same shall be bounded according to the provisions of this act; and the council

of such borough shall forthwith order the same, with all reasonable charges of making and sending the said account, to be paid to the treasurer of such county out of the borough fund; provided, that in case any difference shall arise concerning the last-mentioned account, it shall be decided by the arbitration of a barrister, to be named as is provided in the case of differences with respect to the payment of monies under contracts made by authority of the said act, 5 Geo. 4, c. 85, intituled, 'An act for amending an act of the last session of Parliament relating to the building, repairing, and enlarging of certain gaols and houses of correction, and for procuring information as to the state of all other gaols and houses of correction in England and Wales.' "

in places which do not contribute to the payment of the general county rate, the money is to be paid out of the rate or fund of the place, and by the treasurer of that place, instead of the county treasurer. Then the effect of the Municipal Corporation Act (5 & 6 Will. 4, c. 76), is that, by section 112, the boroughs to which sessions of the peace are given, do not contribute at all to the county rate; and though they formerly belonged to the hundred, still they cease to pay the county rate. It is said, however, that they are liable to contribute to the county rate under sections 113, 114, and 117. But the true construction of the whole act appears to be, that they are free and discharged from paying *any* county rate, and therefore they cannot be assessed under the 7 & 8 Geo. 4, c. 31, over and above the general rate to be paid in common with the rest of the county. The contribution to the county rate under sections 113, 114, and 117, is not to be made in common with the rest of the county, but under special provisions, and out of the borough fund or borough rate: and if the inhabitants of the borough contribute at all, it is only under the special provisions of those sections, and not as part of a hundred. In either case they are within the provisions of section 12 of the 7 & 8 Geo. 4, c. 31; and if so, these proceedings should have been against the inhabitants of the borough under that section.

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Knowles, in support of the rule, was stopped by the Court.

PARKE, B.—It is clear that the borough of Manchester does contribute to the county rate. Then the only question is, whether it contributes as part of the hundred; and I am of opinion that it still continues liable to pay this rate as part of the hundred.

ALDERSON, B.—I am of the same opinion. It is not

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contended that the borough contributes to *all* the county rates: the 114th section of the Municipal Corporation Act throws the whole expense of prosecutions, &c. on the borough; but under section 117, the inhabitants are to contribute as they used to do, and the treasurer of the county is to make the calculation in the same way as formerly. Their liability as part of the hundred is left as it was.

ROLFE, B.—This may be called a *hundred rate*, and as the inhabitants of the borough still contribute to the county rate, they are liable to the hundred rate as they were before.

Rule absolute.



May 2.

The Court refused to allow a defendant, who was sued as the public officer of a banking company, to plead, in addition to pleas of fraud, &c., a plea that he was not the public officer at the commencement of the suit.

NEEDHAM v. LAW, Public Officer, &c.

THIS was an action against the defendant, who was alleged in the declaration to be sued under the stat. 7 Geo. 4, c. 46, s. 9, as the nominal defendant on behalf of the Imperial Banking Company. The defendant had pleaded a plea denying that the company were carrying on business at the commencement of the suit, and also several pleas of fraud: and now

Peacock moved for leave to add another plea, denying that the defendant was the public registered officer of the company at the commencement of the action; and urged that, inasmuch as he could not be sued on behalf of the company unless that were the case, the plea would be in effect a denial of the allegation in the declaration, that he was so sued. If he were not the proper officer to defend the action, a judgment against the company would be futile. [*Parke*, B.—You say the defendant was not the

public officer at the commencement of the suit: tell the plaintiff who was, and he will amend the declaration, if it be wrong.] The defence really is, that the company had ceased to carry on business, and therefore there was no public officer.

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PARKE, B.—If it be so, they must perform the contracts they made while they were carrying on business. The company are the true defendants here, and as there are pleas which go to the merits, we ought not to allow them to turn the plaintiff round upon a matter that is quite immaterial. If the defendant chooses to make this his sole defence, and strike out the other pleas, he may do so, but otherwise he must abandon the plea.

Rule refused.

TAYLOR v. ASHTON and Others.

May 4.

CASE. The first count of the declaration stated, that before and at the time of the making of the report thereinafter mentioned, and at each and every of the times therein respectively mentioned, a certain number of persons were carrying on the business of bankers in copartnership, under the name of the Commercial Bank of England; and that, before and at the said time of the making of the said report, and at each and every of the times in that count mentioned respectively, the capital of the said company or copartnership was divided into shares, divers of which shares were, at the said time of making the said report, appropriated to divers of the said persons so carrying on business as aforesaid, and called "appropriated shares:" that before and at the time of the making of the said report, &c. certain officers of the said

If a party makes an untrue representation to another for a fraudulent purpose, with the intent to induce the latter to do an act which he afterwards does to his prejudice, an action on the case for deceit lies, and it is not necessary to shew also that the defendant knew the representation to be untrue.

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company, being directors thereof, and called Manchester Directors, had the principal control, direction, and superintendence of the accounts and affairs of the said company, and had, as part of their duties as such Manchester directors as aforesaid, the office of exposing to sale and selling on behalf of the said company certain of the said shares, other than such appropriated shares as aforesaid; and that, before and at the said time of the making of the said report, there were, besides such Manchester directors, other officers of the said company called Directors; and that, before and at the said time of the making of the said report, certain of the said directors, that is to say, all the said Manchester directors and certain of the said other directors, were called the General Board of Directors; and that the defendants, before and at the said time of the making of the said report, and at each and every of the times in this count mentioned respectively, were members of the said company, and were acting as Manchester directors of the said company, to wit, such Manchester directors as aforesaid, and directors of the said general board. And the plaintiff further says, that at the said time of making the said report, and at each and every of the times in this count mentioned respectively, the recommendation hereinafter mentioned to have been contained in the said report, of a dividend of 8*l.* per cent. on the appropriated shares of the said company, being accompanied in the same report, as it is hereinafter mentioned to have been accompanied in the same report, with a representation of the said company being eminently prosperous, was, at the said time of the making the said report, and at each and every of the said times in this count mentioned respectively, *naturally calculated to deceive* persons, to whom the contents of the said report should be made known, into believing that the said company had, at the said time of making the said report, made profits sufficient to pay such dividend as aforesaid, and was, at the said time of making the said

report, a profitable undertaking and good investment for money: and the plaintiff further says, that if at the said time of making the said report, the said company had made profits sufficient to pay the said dividend, the said company would, at the said time of making the said report, have been a profitable undertaking and a good investment for money. And the plaintiff further says, that the representation hereinafter mentioned to have been contained in the said report, to the effect that the number of current accounts of the said company, as well as the amounts of its promiscuous discounts, deposits, and London agency, had been so advanced, as speedily to mature a safe and profitable, and indicate a steady progressive business, was, at the time of making the said report, and at each and every of the times in this count mentioned respectively, naturally calculated to deceive persons, to whom the contents of the said report should be made known, into believing that the said company was, at the said time of making the said report, a good investment for money: and the plaintiff further says, that if the last-mentioned representation had, at the said time of making the said report, been true, the said company would, at the said time of making the said report, have been a good investment for money. And the plaintiff further says, that the representation hereinafter mentioned to have been contained in the said report, to the effect that in reference to capital, the position of the establishment (meaning the said company) had been ever creditable, and was at the said time of making the said report perfectly satisfactory, being accompanied in the same report, as it is hereinafter mentioned to have been accompanied, with a representation of the said company being eminently prosperous, was, at the said time of the making of the said report, and at each and every of the times in this count mentioned respectively, naturally calculated to deceive persons to whom the contents of the said report should be made known, into be-

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lieving that the said company was, at the said time of making the said report, a profitable undertaking and a good investment for money : and the plaintiff further says, that if the last-mentioned two representations had, at the same time of making the said report, been true, the said company would at the said time of making the said report have been a profitable undertaking, and a good investment for money. And the plaintiff further says, that the representation hereinafter mentioned to have been contained in the said report, of the said company being an eminently prosperous establishment, was, at the said time of the making of the said report, and at each and every of the times in this count mentioned respectively, naturally calculated to deceive persons to whom the contents of the said report should be made known, into believing that the said company was, at the said time of making the said report, a profitable undertaking, and a good investment for money : and the plaintiff further says, that if the last-mentioned representation had, at the said time of making the said report, been true, the said company would, at the said time of making the said report, have been a profitable undertaking, and a good investment for money. And the plaintiff further says, that at the said time of making the said report, and at each and every of the times hereinafter mentioned, the representation hereinafter mentioned to have been contained in the said report, of the total rejection of nominal capital as a characteristic of the said society, being accompanied in the same report, as hereinafter mentioned to have been accompanied in the same report, with the other statements and matters hereinafter mentioned to have been contained in the said report, and to have been false, was naturally calculated to deceive persons, to whom the contents of the said report should be made known, into believing that the said company was at the said time of making the said report a profitable undertaking, and a good investment for money : and the plaintiff

further says, that if the last-mentioned representation, as to the total rejection of nominal capital being a characteristic of the said company, had at the said time of making the said report been true, and if the said other statements and matters hereinafter mentioned to have been contained in the said report had at the said time of making the said report been true, the said company would, at the said time of making the said report, have been a profitable undertaking and a good investment for money: all which said several premises respectively they, the defendants, at the said time of making the said report, well knew:—Yet the defendants, heretofore, to wit, on the 3rd day of February 1836, then being and acting as such Manchester directors as aforesaid, wrongfully and injuriously contriving and intending to cause the contents of the said report to be publicly made known, and to cause it to be publicly represented and advertised that the said company was at the said time of making the said report a profitable undertaking, and thereby to deceive persons to whom such contents, and such last-mentioned representation, should be made known into believing that the said company had at the time of making the said report made profits sufficient to pay a dividend of 8*l.* per cent. on the said appropriated shares of the said company, and that the said company was at the said time of making the said report a profitable undertaking, and a good investment for money, and by means of such deceit to induce such persons as last aforesaid to purchase of the said Manchester directors shares in the said capital of the said company; at a certain meeting of divers members of the said company, at which meeting divers members of the said company, besides the defendants, but whose names are to the plaintiff unknown, were present, *falsely, fraudulently, and deceitfully* made and published a certain false, fraudulent, and deceitful report of and concerning the said company, and of and concerning the said general board of directors, and of and concerning

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the said meeting, and of and concerning the said accounts of the said company, and of and concerning the said appropriated shares, to wit, the report hereinafter set forth, and so then as aforesaid made and published the same, meaning to insinuate thereby the several matters hereinafter stated to have been meant; and then, and on divers other days and times between the day and year last aforesaid, and the making of the contents of the said report known to the plaintiff as hereafter mentioned, further contriving, intending, and meaning as aforesaid, distributed divers, to wit, a number unknown to the plaintiff, copies of the said report to one Thomas Langton hereinafter mentioned, and to and amongst divers other persons whose names are to the plaintiff unknown: which said report was and is in the words following (that is to say):—

“Commercial Bank of England (meaning the said company), Head Bank, Manchester.—Report of the directors to the first annual meeting of the proprietors. Wednesday, 3rd Feb. 1836. The directors have much pleasure in being assembled conformably to the deed of settlement, to declare to the first annual meeting of the proprietors the policy, progress, and prospects of the bank. It will be within the recollection of the present meeting, that Lord Althorp, during the years 1833 and 1834, contemplated the exaction of security from joint-stock banks, and that this security was to be rated not upon the actual, (that is, paid up), but upon the subscribed, (that is, nominal), capital. To the just apprehension then entertained, the present establishment owes its origin, and also its grand negative characteristic, namely, the total rejection of nominal capital (meaning thereby that the total rejection of nominal capital was at the said time of making the said report a characteristic of the said company, and thereby then, in conjunction with the other statements and matters hereafter mentioned to have been contained in the said report, and to have been false, meaning to insinuate that the said company was at the same time of making the said report a

profitable undertaking, and a good investment for money). Recent occurrences, as well as the voice of an observant and well-informed community, have abundantly confirmed the propriety and soundness of this policy, and in the question of stock, it has been clearly ascertained and practically illustrated, that the most legitimate and advantageous method of increasing a bank capital is by the extension of its proprietary. The Bank of Liverpool lately reverted to this as being the most expedient policy. The steady progress and elevated position of a joint-stock banking company are best insured by a careful and judicious distribution of its original shares. A lavish allotment of shares certainly realizes a large capital, but this in the infancy of a banking company is a positive evil. In young establishments, there is generally a lack of experience, which is not unfrequently acted upon by the importunity of applicants, until the funds in excess are drained off in insufficient and unavailable security, and consequently cannot be produced when required in more profitable business. The obvious and true policy is, that whilst the organization of the company is the chief object, its working capital should be proportionate to a moderate and select business: that its capital should be increased only as good business is obtained, and that a fair proportion of its shares should be scrupulously reserved to realize an ample surplus fund, and to insure an influential extension of the company, on the completion of its arrangements and the establishment of its character. This policy has regulated the management of the Commercial Bank of England from its origin; and whilst on the one hand a careful distribution of shares has supported speculation and excluded hazard, on the other, it has not only given uniform satisfaction, and yielded every anticipated advantage, but has also opened a vast and important field, which promises results of a peculiarly favourable character in progress. Although from its commencement this establishment had to encounter the hostility of the Bank of England, and to

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compete with numerous joint-stock banks of wealth and influence, nevertheless its number of current accounts, as well as the amount of its promiscuous discounts, deposits, and London agency, have been so advanced as speedily to mature a safe and profitable, and indicate a steadily progressive business, (thereby meaning to insinuate that the said company was at the said time of making the said report a good investment for money). Upon its issues an incessant vigilance and attention have been bestowed, and the directors are well satisfied with their policy, and with the character which the establishment has attained. Indeed, in this all-absorbing and vitally momentous department, the bank's accountancy and controul are carried to a degree of perfection which leaves nothing further to be desired; suffice it to say, that on each Wednesday morning the head office knows to a note the circulation of each bank and of the entire establishment, and that a return post is sufficient to produce the like account on any day. On balancing the accounts, (meaning the said accounts to the 31st of December last), and taking into consideration the expenditure and business, with the ascertained progress of each bank of the establishment, the directors recommend that a dividend of 8l. per cent. be declared and paid on the appropriated shares of the company, (meaning the said company, and by the said recommendation, accompanied in the same report with the representation of the said company being eminently prosperous, as hereafter mentioned, meaning to insinuate that the said company had at the said time of making the said report made profits sufficient to pay such dividend, and was at the said time of making the said report a profitable undertaking and a good investment for money). With regard to the branches, and the entire economy of the establishment, the directors have to report most favourably. In reference to capital, the position of the establishment has been ever creditable, and is perfectly satisfactory, (then meaning by the said representation, of the

position of the said company, in reference to capital, having been ever creditable, and being at the time of making the said report perfectly satisfactory, accompanied in the said report with the representation of the said company being eminently prosperous, that the said company was a profitable undertaking, and a good investment for money), whilst from its reserved shares its prospects are highly flattering, as a large profit and greatly extended business will be commanded by their judicious appropriation. In conclusion, this meeting affords the directors a favourable opportunity of reminding many of their fellow shareholders, that they should bring a direct business, or other aid, at least equal to the return now proposed; and they most respectfully and impressively urge that, whilst this young and eminently prosperous establishment (meaning the said company, and thereby then meaning to insinuate that at the said time of the making of the said report the said company was eminently prosperous, and a profitable undertaking, and a good investment for money) offers every facility which a well-founded deposit, loan agency, discount and circulation bank can possibly do, and whilst it has been promptly resorted to and liberally supported by the enlightened public in this district, surely no part of its own proprietary will fail to observe how greatly they may contribute, by their personal and united support, to increase and characterize its energies, to exalt and proclaim its character, and to employ and augment its wealth."

And the plaintiff in fact says, that at the said time of making the said report, the said company had not made profits sufficient to pay such dividend as aforesaid, as the defendants at the said time of making and publishing the said report and distributing the said copies *well knew*. And the plaintiff further says, that at the said time of making the said report, the said company was neither a profitable undertaking nor a good investment for money, as they the said defendants, at the said time of making and publishing the said report and distributing the said

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copies, well knew. And the plaintiff further says, that at the said time of making the said report, the number of current accounts of the said company, as well as the amount of its promiscuous discounts, deposits, and London agency, had not been so advanced as speedily to mature a safe or profitable, or indicate a steadily progressive, business, as the defendants, at the said times of making and publishing the said report and distributing the said copies, well knew. And the plaintiff further says, that in reference to capital, the position of the said company, at the said time of making the said report, had neither been ever creditable, nor was it at the said time of making the said report perfectly satisfactory, as the defendants, at the times of making and publishing the said report and distributing the said copies, well knew. And the plaintiff further says, that at the said time of making the said report, the said company was not eminently prosperous, or even prosperous, as the defendants, at the said times of making and publishing the said report and distributing the said copies, well knew. And the plaintiff further says, that the total rejection of nominal capital was not, at the said time of making the said report, a characteristic of the said company, as the defendants, at the said times of making and publishing the said report and distributing the said copies, well knew. By means and in consequence of the making and publishing of which said report as aforesaid, and of the distributing the said copies as aforesaid, it was afterwards, to wit, on the 14th of February, 1836, represented to the plaintiff, by the said Thomas Langton, that the said company, at the said time of making the said report, was a profitable undertaking; and by means and in consequence of the same making, publishing, and distributing, as aforesaid, the said contents of the said report were also afterwards, to wit, &c., made known to the plaintiff by the said Thomas Langton, whereby the plaintiff was then deceived into believing that the said company had, at the said time of making the said report, made profits

sufficient to pay such dividend as aforesaid, and was, at the said time of making the said report, a profitable undertaking and a good investment for money; and by means and in consequence of being so deceived, and of the said several premises, was then, to wit, on &c., induced to purchase, and actually did purchase, of and from the said Manchester directors of the said Company, divers, to wit, 200 shares in the capital of the said company, at and for certain prices for the said shares, amounting to a large sum, to wit, the sum of £1054 7s. 8d.; and by means and in consequence of being so deceived, and of the said several premises, was then induced to pay and paid to the said Manchester directors the said prices, to wit, the said sums of £1400 and £1054 7s. 8d. By means whereof the plaintiff has not only lost the use of the said monies so by him paid, being of great value, to wit, of the value of £2 per cent per annum, for a long time, to wit, from thence until the commencement of this suit, but is likely to lose the said monies altogether, and the future use thereof, being of great value, to wit, of the value aforesaid.

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There were other counts, founded on subsequent annual reports.

The defendants pleaded not guilty, on which issue was joined, and other pleas which it is not necessary for the purpose of this report to state.

The cause was tried before *Coltman, J.*, at the last Liverpool Assizes. It appeared that the action was brought to recover from the defendants, directors of the Commercial Bank of England, carrying on the business of the bank at Manchester, compensation for a loss sustained in respect of 700 shares in the undertaking, which the plaintiff alleged that he had purchased and retained on the faith of the representations contained in the reports set out in the declaration. It appeared clear from the evidence, that the representations therein made of the flourishing state of the bank were altogether untrue, and that they were made with the view of inducing parties to become shareholders:

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the main question was, whether there was sufficient proof to fix the defendants with knowledge of their being untrue. The jury having found a verdict for the defendants, under the direction of the learned Judge, stating at the same time their opinion that the defendants had been guilty of "*gross and unpardonable negligence*" in publishing the report:—

On a former day in this term, (April 25),

Knowles moved for a new trial, alleging that the learned Judge had misdirected the jury as to the question of fraud. —First, his Lordship laid it down generally to the jury, that, in order to find for the plaintiff, they must be satisfied, not only that the defendants had published a false and fraudulent report, but also that they had done so *with the knowledge* that it was false and fraudulent; leading the jury to believe that proof of *moral* fraud was essential to entitle the plaintiff to a verdict. That proposition was too wide. It is submitted that the true rule of law is, that wherever one party makes a false representation to another, with the view of inducing him to do a particular act, and with a view to his own benefit, and the other does the act, and suffers a detriment thereby, a cause of action accrues, without proof that the representation was false within the knowledge of the party making it; especially where he has all the means of information, and the other party has none. Here, by the deed of settlement, the directors alone had power to inquire and ascertain whether the statements contained in this report were true or false. That is the doctrine to be deduced from the authorities on this subject:—*Pasley v. Freeman* (a), *Haycraft v. Creasy* (b), *Vernon v. Keys* (c), *Schneider v. Heath* (d), *Adamson v. Jarvis* (e).—He referred also to the judgment of Lord *Abinger*, C. B., in *Cornfoot v. Fowke* (f), and to *Fuller v. Wilson* (g). [*Parke*,

(a) 3 T. R. 51.

(b) 2 East, 92.

(c) 12 East, 632.

(d) 3 Campb. 506.

(e) 4 Bing. 66; 12 Moore, 241.

(f) 6 M. & W. 358.

(g) 2 G. & D. 460.

B.—I adhere to the doctrine that an action for deceit will not lie without proof of moral fraud; and Lord *Denman*, in the case last cited, seems to admit that to be so. If the party *bonâ fide* believes the representation he made to be true, though he may not *know* it, it is not actionable.] Even upon that supposition, the case was not properly presented to the jury; for it was never left to them whether the defendants *believed* the report to be true. The jury never could have found that they did believe it, having, as they had, weekly accounts shewing the losses of the concern. The jury ought surely to have had some exposition of what constituted *fraud*, such as to render the defendants liable. [*Parke*, B.—There may undoubtedly be a fraudulent representation, if made dishonestly, of that which the party does not know to be untrue, if he does not know it to be true. The question is, whether that proposition is not involved in the direction to the jury, that the representation must have been *fraudulent* in order to render the defendants liable.] But *knowledge alone* was made the evidence and criterion of the fraudulent purpose; the jury were instructed, that if the defendants did not know the report to be untrue, it was not fraudulent. In truth, the finding of the jury, that the defendants had been guilty of “gross and unpardonable negligence,” is sufficient to render them liable; such negligence, in persons holding such a position with reference to the concerns of the company, was tantamount to fraud.—He contended also, that there was a misdirection as to the effect of one of the clauses of the deed of settlement, giving the directors the power of giving a “cash credit,” under which they had allotted certain shares to the directors, on which no subscription was paid up; and also that the learned Judge improperly withdrew from the consideration of the jury the proceedings of certain meetings of the directors at which all the defendants were not present.

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The judgment of the Court was now delivered by

PARKE, B.—In this case Mr. *Knowles* made a motion for a rule to shew cause why there should not be a new trial, on the ground of misdirection of the learned Judge, my Brother *Coltman*. We have had the opportunity of looking over my Brother *Coltman's* note, and also of reading the note furnished by Mr. *Martin* of the summing up, and we think there ought not to be any rule.

The action was brought against the defendants, who were the directors of the Manchester department of the Commercial Bank of England, for false and fraudulent representations alleged to have been made by them, in a report which was published, stating in substance the flourishing state of the bank. It is alleged that this report was calculated to induce persons to buy shares, and that it was published by the defendants fraudulently, with the view to induce persons to buy shares; that the plaintiff had bought shares upon the faith of it, and that the statements contained in that report were untrue, and that the defendants knew them to be untrue at the time of the publication. That is the substance of the first count of the declaration, on which the question entirely arises. It is said the learned Judge misdirected the jury in several respects. The principal objection was, that he told them it was necessary they should be satisfied that a fraud—that, is a *moral fraud*—had been committed by the defendants. It was contended by Mr. *Knowles*, that it was not necessary moral fraud should be committed, in order to render these persons liable; for that if they made statements for their own benefit, which were calculated to induce another to take a particular step, and if he did take that step to his prejudice in consequence of such statements, and if such statements were false, the defendants were responsible, though they had not been guilty of any moral fraud. Indeed, he said the finding of the jury on this issue would warrant the posi-

tion he took :—because the jury found the defendants not guilty, but at the same time said they begged to express their opinion that the defendants had been guilty of *gross negligence*; and it is insisted that even that, accompanied with a damage to the plaintiff in consequence of that gross negligence, would be sufficient to give him a right of action. From this proposition we entirely dissent; because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind, unless it be *fraudulently made*. That is the doctrine laid down in *Pasley v. Freeman*, where, for the first time, the cases on this subject were considered. In that case Mr. Justice *Grose* differed from the rest of the Court, and thought the law gave no remedy for fraud, unless there was a contract between the parties. The Court, however, held, that if a person told that which was untrue, and told it for a fraudulent purpose, and with the intention to induce another to do an act, and that act was done to the prejudice of the plaintiff, then an action for fraud would lie. That case was followed by *Haycraft v. Creasy*, and a great variety of other cases, and it must now be considered as established law. But then it was said, that, in order to constitute that fraud, it was not necessary to shew that the defendants *knew* the fact they stated to be untrue; that it was enough that the fact *was* untrue, if they communicated that fact for a deceitful purpose; and to that proposition the Court is prepared to assent. It is not necessary to shew that the defendants knew the fact to be untrue; if they stated a fact which was true for a fraudulent purpose, they at the same time *not believing* that fact to be true, in that case it would be both a legal and moral fraud. It is said that the learned Judge ought to have left the question more distinctly to the jury; and that if he had asked the jury whether the defendants *believed* the statement to be true, the verdict would have been for the plaintiff. It became necessary to look through

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the notes of the learned Judge's summing up with attention, to see whether this question had substantially been presented to the jury. We have had an opportunity of looking at the summing up, and considering it; and we are of opinion, looking at the charge altogether, though there are particular expressions in it which would give colour to the notion that the learned Judge thought it was essential to shew the defendants *knew* the matter to be untrue, yet that, looking at it altogether, that is not the conclusion to be drawn from it. It is to be recollected, that in the way in which the case was presented for the decision of the jury, there really was a substantial point for their consideration. This report was not prepared by the defendants themselves—the directors; it was prepared by some of the officers of the company, and afterwards adopted by the directors, having been read at a meeting at which they were present. The question for the jury was, was that a fraudulent report, and were the defendants parties to that fraud? That question, we think, has been substantially left to the jury; the jury thought the defendants did believe that report to be true, which was so circulated by their direction. We cannot, therefore, upon the general objection to the summing up, grant a rule for a new trial.

Then Mr. *Knowles* objects that there were particular parts of this summing up which were wrong, and particularly with regard to the first part of it. The report contained two allegations, which were alleged to have been fraudulent; one was, “that it was a peculiar characteristic of the Commercial Bank of England, that they dealt not in nominal capital, but upon capital that had been subscribed and fully paid up.” The learned Judge told the jury, in referring to that question, that he did not think what was proved amounted to a fraud. Now what was proved was this: that there were certain shares allotted to the directors, on which they did not pay up their subscrip-

tion ; they were considered as debtors to the company for the amount. The learned Judge told the jury that he thought that was no fraud. Either the amount of the shares was paid up, or, provided it was not, they were payable by the members of the company, so that they could be called upon to pay the whole amount at any time. He did not think that amounted to fraud ; but this was no matter of law, it was a mere observation on the fact. It was for the jury, notwithstanding, to decide whether they thought that was or was not a correct representation, when the defendants said they were not dealing in nominal capital. And accordingly it appears the learned Judge said, "After all, it is a question for you to decide, not for me." Again, it is said the learned Judge misinstructed the jury, because he referred to one of the clauses of the deed of settlement, in which power is given to the directors to give credit on the *cash account* to any member and shareholder of the company, to the amount of their paid up capital, as authorizing the directors so to deal with these shares, and give credit for them. That clause would certainly not authorize the directors to give credit to any of the individual shareholders for more than the value of their shares, or to the extent they had paid up on those shares. But looking at the mode in which that was left to the jury, and considering that the learned Judge was not discussing it as matter of law, but merely shewing that the directors had the power, under certain circumstances, to give credit to certain individuals mentioned—that is not any misrepresentation of the law, or any misconstruction of the instrument in a legal point of view : and we cannot say that any wrong observation on a matter of fact, in which we could not concur, is a ground for granting a new trial, if it was left as a question of fact for the jury. Lastly, it was objected, that the learned Judge withdrew from the consideration of the jury the proceedings at all the meetings excepting those at which all the defendants were present. We cannot

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consider that he did that more than for the convenience of arrangement. It does not appear that he has withdrawn from their consideration the proceedings at any meeting which would tend to fix fraud on any individual at that meeting; because, no doubt, some of the defendants might have been guilty of fraud, and others might not. On the whole, therefore, although there are particular expressions which would seem at first to warrant the idea that the Judge supposed that it was necessary to prove that the defendants actually knew what they stated to be false, yet, looking at the whole together, the Court are not prepared to say that such is the true construction to be put on the whole of the summing up, or that there has been any misdirection in matter of law as to the question of fraud.

We are, therefore, of opinion that there ought to be no rule for a new trial.

Rule refused (a).

(a) See *Moens v. Heyworth*, 10 M. & W. 147.

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By an act of the 32 Geo. 3, for making a canal in the county of N., the "owners or proprietors of any mines of coal" within certain parishes were empowered to make any railways or roads to convey their coals &c. to the said canal, over the lands or grounds of any person or persons, paying or tendering satisfaction &c. for the damage to be thereby occasioned:—*Held*, that this power was not limited to persons who were proprietors at the time of the passing of the act, or of the making of the canal, but extended to other persons who had become so since, and that such owners or proprietors were empowered to make railroads to be traversed by locomotive engines.

THIS was a special case, sent for the opinion of this Court by the Vice-Chancellor of England.

By an act of Parliament passed in the 32 Geo. 3, intituled "An Act for making and maintaining a navigable canal from the Cromford Canal in the county of Nottingham, to or near to the town of Nottingham, and to the river Trent near Nottingham Trent Bridge, and also certain collateral cuts

therein described from the said intended canal," reciting that the making and maintaining a canal for the navigation of boats, barges, and other vessels, from the Cromford Canal, in the parish of Eastwood, in the county of Nottingham, to or near to the town of Nottingham, and to join and communicate with the river Trent near Nottingham Trent Bridge, and also the making and maintaining the several collateral cuts thereafter mentioned, with proper railways and roads to the said intended canal and collateral cuts, would open an easy communication between several valuable mines of coal and the town of Nottingham and the country with which the said intended canal and collateral cuts would communicate by means of the river Trent, and would facilitate the conveyance of stone, limestone, lead, iron, marble, corn, groceries, and other articles, for the accommodation of the said town of Nottingham and the country with which the said canal and collateral cuts would communicate as aforesaid, and would be of public benefit: it was enacted, that certain persons therein named should be a company for the better carrying on, making, completing, and maintaining the said intended canal and collateral cuts, according to the rules, orders, and directions thereafter mentioned, and should for that purpose be one body politic and corporate, by the name of The Nottingham Canal Company, &c. &c. And the said Nottingham Canal Company were thereby authorized and empowered, from and after the passing of that act, to make and complete a canal navigable and passable for boats, barges, and other vessels, from the Cromford Canal in the manner therein mentioned, to and to join and communicate with the river Trent, with collateral cuts as therein mentioned, and with the usual and necessary appurtenances in the said act particularly mentioned and described. And by the 54th section of the said act, it was enacted, "That in case any proprietor or proprietors of any manor or estate, containing any mines of coal, iron-

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stone, or other minerals, or the renters, lessees, or occupiers of the same, should find it expedient or necessary to make any railway or roads to convey his, her, or their coals, ironstone, limestone, marble, or other stone or minerals to the said intended canal and collateral cuts, over the lands or grounds of any person or persons, then and in every such case, it should be lawful for him, her, or them to make any such railways or roads, he, she, or they first paying or tendering satisfaction for the damages to be thereby occasioned to such lands or grounds, in manner therein directed with respect to land to be taken for the purposes of the now stating act; and that it should also be lawful for the owner or owners of, and person or persons interested in, such lands or grounds, to treat and agree with any such proprietor, renter, lessee, or occupier, for the damage to be done to such lands or grounds by making any such railway or roads" &c. &c. And by the 57th section it was further enacted, "That it should be lawful for the proprietor or proprietors of any lands or grounds, or of any mines of coal, ironstone, limestone, or other minerals, to make any navigable cut or cuts through his, her, or their own lands, in such manner as he, she, or they should think proper, to communicate with the said intended canal or collateral cuts, or any of them." And by the 58th section of the said act, after reciting that it was reasonable that the several owners and occupiers of coal-mines within the parishes of Bilborough, Broxtowe, Nuthall, and Basford, and the neighbourhood thereof, being situate near the said intended canal, should have a free communication between their said coal-mines and the said intended canal, and reciting that such communication might be effected by making a navigable cut from the said intended canal, in the parish of Wollaton, through the lands of Henry Lord Middleton, into the parish of Bilborough, and that the said Henry Lord Middleton was consenting that such cut should be made

through his lands, it was therefore enacted, that it should be lawful for the owners or occupiers of any mines of coal within the parishes or hamlets of Bilborough, Nuthall, and Basford, or any of them, at his or their own expense to make a navigable cut from and to communicate with the said intended canal, at the east end of the summit level thereof, in as direct a line as might be through the lands of the said Henry Lord Middleton, to the said parish of Bilborough, to or near to a certain fence within the said parish therein described, and also to make a proper towing path on the side of such cut; the person or persons who should make such cut making satisfaction for the damage to be thereby occasioned to the lands of the said Lord Middleton, his heirs or assigns, in the manner by that act directed, and that such cut should be public and open to all persons for the conveyance of any goods, wares, or other things in boats and other vessels, upon payment to the person or persons at whose charge and expense such cut should have been made, his, her or their heirs, executors, administrators, or assigns, of such sum of money in gross or such yearly rent as the said commissioners should judge reasonable on account of the expenses of making and maintaining such cut, and that the owners or occupiers of any mines of coal should have the like powers and authorities for making any railway from any such mines of coal to the north end of the cut to be made to the said parish of Bilborough as aforesaid, as they were or should be entitled to by virtue of that act for making railways to the said canal and collateral cuts.

The canal mentioned in the said act of Parliament was made and completed by the said Nottingham Canal Company, under the powers of the said act, in about two years after the passing thereof, and some time in or about the years 1798 and 1799 the cut mentioned and provided for in and by the 58th section of the said act was made ac-

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cording to the terms thereof, and is now called the Bilborough Cut.

The defendants are local masters and coalowners trading in copartnership together, and are joint proprietors, renters, lessees, or occupiers of certain collieries situate in the parishes of Shelley, Nuthall, and Basford respectively, and of certain collieries situate at Babbington, called the Babbington Collieries. Some years since, by virtue of the said Nottingham Canal Act, a railway was made by one Gervase Bourne, who preceded the defendants in the occupation of the said Babbington Collieries, from the said Babbington Collieries to the said Nottingham Canal, which railway still subsists, and is used by the defendants to convey coals and minerals to the said Nottingham Canal, and by the canal to Nottingham. The defendants some time since, with the consent of the owners of the lands, made a certain other railway communicating with the railway before mentioned at the Babbington Collieries, and passing through the parishes of Bilborough and Nuthall to a place called Cinder Hill, and a junction with such last-mentioned railway has been formed by the said defendants at Cinder Hill, by means of a railway made to communicate with a certain intended colliery called the Nuthall Colliery.

The defendants intend to obtain and raise coals and other minerals from the said Nuthall Colliery, and they propose forming a railway fitted for the use of locomotive steam-engines, from their said colliery, through the parishes of Basford &c. to join the said Nottingham Canal.

The plaintiffs are the owners of certain lands lying in the line of the proposed railway, and they are not consenting to have their said lands crossed by or used for the purposes of such proposed railway.

A railway from the Nuthall Colliery to the north end of the Bilborough Cut would not pass through any lands belonging to the plaintiffs.

The questions for the opinion of the Court are, first, *Exch. of Pleas,* whether the defendants have a right to make a railway over the said plaintiffs' land under the provisions of the said act; secondly, whether they have a right to make a railway over the plaintiffs' land for the purpose of being traversed by locomotive engines. 1843.

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The points marked for argument on the part of the plaintiffs were the negative of the questions proposed. The defendants' points were, that they were empowered by the 54th section of the Canal Act to make a railway from their Nuthall Colliery to the canal. That the act having given the power to make railways *generally*, without any restriction as to their construction, or as to the mode in which they are to be used, the defendants have a right to make them for the purpose of being traversed by locomotive engines. That at all events there can be no legal objection to the defendants so constructing their railway as that it may admit of being traversed by locomotive engines as well as by animal power. That if the use of locomotive engines would be injurious to the plaintiffs, the time to object to the use of them will be when the defendants begin to use them.

Whitchurst, for the plaintiffs.—The power given by this act is not a continuing power, but is confined to those persons who were the proprietors and owners then existing, or who might have been existing during the progress of the making of the canal, and therefore the defendants do not fall within its provisions, and have no authority to make this railway. It was limited to persons who were interested in the mines and estates in those days, who were well known, and whose consent was probably obtained to the passing of the act, or who must be taken to have assented to it because they did not oppose it. But it never could be intended that persons who at the time had no interest in the mines at all, and who did not know of the act or its

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provisions, should be allowed to take the lands of the owners for any such purposes as they might thereafter require. This, being a private act of Parliament, ought to be construed strictly as against individuals claiming to derive powers under it, and more favourably as regards the public. 2 Darris on Statutes, 688. Acts of Parliament of this description are to be considered as mere private bargains with the legislature, and their provisions ought not to be extended beyond their fair and obvious meaning. [*Alderson, B.*—There is nothing to shew that this is an unreasonable exercise of the power.] It is submitted that the defendants have no right to make this railway, for several reasons: first, they have already made one railway to the canal under the power given by the act; and having exercised that power, they cannot abandon that railway and make others. They may have the power to make one railway, but not an infinite number of railways. The power cannot be extended beyond the express terms of it. Having once selected a particular line, they cannot abandon that at pleasure, and make other railways from place to place. Again, they cannot make the railway as proposed, for, by the 58th section, they are bound to make it to the north end of the Bilborough Cut. This colliery is situated in Nuthall, and the legislature seem to have thought that the owners and occupiers of mines there ought to be bound to use the Bilborough Cut.

Secondly, the defendants are not authorized to make a railway which requires locomotive engines. The power to use such railways was not contemplated at the time of the passing of this act in 1792. The laying down of such railways as were then in existence was very different from what would be required for locomotive engines. [*Parke, B.*—Was not this matter decided by *Dand v. Kingscote* (a)?—not that you might use locomotive en-

(a) 6 M. & W. 174.

gines; but it was held that the authority was not necessarily limited to such ways as were in use at the time of the grant.] Though the point was raised, it was not decided whether, under the reservation of a sufficient wayleave, the coal-owner had a right to make a railway with cuttings and embankments, and fenced in so as to exclude the owner of the soil. In 1792, before locomotive engines were known, the railway was nothing more than two pieces of iron or wood laid on the surface of the land, without cuttings or embankments, and the right to make the railway gave no privilege or right to make cuttings or embankments. It was, in truth, nothing more than a tram-road, with the right of going upon the road so laid down, the carriage being drawn by horses, and it was not necessary to make it upon a flat surface; and this consequence followed, that the owner was not excluded from the occupation of the land, but traversed over his close as if no railway existed. The privilege of making such a railway would not authorize the defendants in making the one they contemplate. [*Parke, B.*—The parliamentary power is to make *any* railway; it does not say, such as are now made, but any railway.] If the act be held to give the defendants the power of running locomotive engines, it of necessity would exclude the owners of land from traversing these roads altogether, and the defendants must have exclusive possession of the land occupied by the railway, which never could have been the intention of the legislature. The parties are not empowered by the act to *take* the land, but only to make roads *over* the lands or grounds of any person or persons—and a power is given to meet and agree with the proprietors or lessees for the damages to be occasioned by such railway, and if they cannot agree, then it is to be settled and ascertained by commissioners as therein mentioned. It never was intended to give them any power to take the land; they merely were to have a right of road, and having that, it was not intended to give

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them the power of raising an embankment and excluding the owners from the land, which it would be necessary to do for the purpose of constructing and using the contemplated line.

Humfrey, contra, was stopped by the Court.

PARKE, B.—I think the defendants in this case have a right to make the proposed road for carrying coals by any reasonable means, provided it does not create a nuisance. The power given by the act is to make *any railway*; and it is not shewn that the term *railway* has any definite meaning, requiring it to be made on the level; and I cannot think that it can be qualified by shewing that, at the time of the passing of the act, a particular species of railway, unlike the one contemplated, was in use. The power is general, to make railways over the lands or grounds of any person or persons, making satisfaction for the damages to be occasioned thereby. The railroad in question must, however, be properly adapted to the purpose, and reasonable care must be taken that it does not become a nuisance to the public or to individuals.

ALDERSON, B.—Subject to that restriction, the defendants are entitled to make any road embracing the last improvements that are in existence at the time they make the road.

ROLFE, B., concurred.

The following certificate was afterwards sent:

First, We have heard the case argued by counsel, and have considered the same, and are of opinion that the defendants have a right to make a railway over the plaintiffs' land under the provisions of the act of Parliament mentioned in this case.

Secondly, We are of opinion that the defendants have a right to make such a railway over the plaintiffs' land, properly constructed for the purpose of being traversed by such locomotive engines, if any, as can be used for the purposes in the act mentioned without occasioning any public or private nuisance. Dated this 2nd day of May, 1843.

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R. M. ROLFE.

PARDOE, surviving Executor of KINNERSLEY, v. PRICE.

May 8.

THIS was an action of debt brought by the plaintiff, as surviving executor of the will of Lucy Maria Kinnersley, the executrix of the will of James Kinnersley, against the defendant, the clerk to the trustees for executing an act of Parliament of the 29 Geo. 2, for repairing and widening certain roads in the county of Hereford therein specified, and of certain other acts of the 13, 34, & 59 Geo. 3, enlarging, amending, and continuing the same. The first count of the declaration stated, that whereas theretofore, to wit, on the 1st of January, 1795, by a certain deed then made between the said J. Kinnersley of the one part, and the trustees named in the three first of the aforesaid acts of Parliament, under their hands and seals, of the other part, which deed has been lost by length of time and accident, the said trustees assigned to the said James Kinnersley and his executors one-twentieth part of the tolls to be levied by virtue of the said acts, to secure the repayment of £200 advanced by the said J. Kinnersley to the

By a local act (29 Geo. 2), the trustees of certain turnpike roads were empowered to borrow money at interest upon the credit of the tolls, and to assign them by way of mortgage as a security, such money to be repaid out of the money arising from the tolls, and after payment of the expenses of the act of Parliament, to be disposed of as the said tolls and duties were directed by the act to be disposed of.

The plaintiff's testator having ad-

vanced £200 on these tolls, the turnpike trustees by deed assigned one-twentieth part of the tolls to secure the £200 and interest; and the plaintiff having brought an action of debt for £400, the interest due, and averred in the declaration that the tolls received were sufficient to pay all the interest on all the sums advanced on the credit of the tolls:—*Held*, on special demurrer to the declaration, that the plaintiff was not entitled to maintain an action against the trustees to recover the interest.

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said trustees on the credit of the said tolls, together with interest at £5 per cent. per annum ; yet, after the making of the said deed, and after the death of the said James Kinnersley, to wit, on the 1st of January, 1842, arrears of interest on the said sum of £200, to a large amount, to wit, the amount of £400, being the interest for forty years last past, were due, and the tolls received by the said trustees since the making of the said deed were sufficient to pay all the interest on all the sums advanced on the credit of the said tolls, whereby an action hath accrued &c. ; yet the defendant hath not paid the same or any part thereof to the said James Kinnersley, or to the said Lucy Maria Kinnersley, or to the plaintiff.

Special demurrer, assigning for causes, that the deed was not sufficiently described, and that no sufficient contract was alleged whereon a liability to the payment of the sum of money sued for could arise ; nor was there any covenant set forth or shewn, whereby the trustees could or did become liable to the payment either of the principal money or interest mentioned ; neither was there any cause of action sufficiently disclosed on the face of the said count at common law, nor was it made to appear that such a mode of declaring was given or warranted by any statute now in force. And further, that it does not appear that the principal money and interest are severable or separate debts accruing on or in respect of separate or distinct contracts, and that it is defective in not shewing on what ground the plaintiff has declared in respect of the interest alone, without shewing whether the principal sum was or was not still subsisting as a debt. And the said count is further defective, in not shewing more specifically how the interest claimed accrued, and at what rate the same was reserved, and that it at most shews a right in the said James Kinnersley to receive certain tolls, but discloses no personal liability on the part of the trustees to pay.

Joinder in demurrer.

Peacock, in support of the demurrer.—The question in this case arises on the local act, 29 Geo. 2, by which the trustees of certain turnpike roads were empowered to borrow at interest certain sums upon the credit of the tolls, and to assign the tolls by way of mortgage as a security for the money borrowed, “which said tolls or duties so to be assigned or mortgaged shall be a security for repayment of such sum or sums of money to be borrowed, which shall be repaid out of the money arising or collected by the said tolls or duties with legal or less interest for the same; which money so borrowed, after paying and discharging the expenses of obtaining this present act of Parliament, shall be applied and disposed of as the said tolls and duties are by this act directed to be applied and disposed of, and to or for no other use or purpose whatsoever.” But it does not appear that the trustees have covenanted to pay the money, and therefore the plaintiff can have no right of action against them. The proper remedy is by an action of ejectment against the trustees, for the stat. 3 Geo. 4, c. 126, s. 49, gives the mortgagee power to bring ejectment in order to pay himself the principal money and interest advanced. *Pontet v. The Basingstoke Canal Company* (a) is an authority to shew that this action is not maintainable. There the Company were empowered by act of Parliament to raise money on the security of the canal and dues. By the form of the deed given in the act, the canal and dues were assigned to the lenders as security for the principal money lent, the interest on which was to be paid half-yearly: and it was held that an action of covenant for non-payment of interest did not lie against the company on such deed. Besides, the plaintiff being entitled to one-twentieth part only of the tolls, it ought to have been shewn that the trustees received that particular portion of the tolls, whereas it is only stated that the tolls received

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(a) 3 Bing. N. C. 433; 2 Scott, 543.

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by the trustees since the making of the said deed were sufficient to pay all the interest on all the sums advanced on the credit of the tolls, without saying whether the trustees had received all the tolls. Non constat that the plaintiff himself did not receive the portion of the tolls which had been assigned to him. Again, by the local act the trustees were directed to pay the expenses of passing the act out of the first tolls received by them, and it does not appear that they have received more than the expenses of passing the act. All that is stated is, that the tolls received were sufficient to pay the interest on the money advanced; but if the proper averments had been made, the trustees might have been able to discharge themselves by shewing that they had exhausted the funds in paying the expenses of obtaining the act, and repairing the roads, which they were bound to do. The count, therefore, does not shew that the money was received for the plaintiff's use. Besides, there is no clause in the act of Parliament directing the trustees to pay the interest on the monies borrowed. The only remedy of the plaintiff, therefore, was to receive the tolls himself, for so long as he allowed the trustees to receive the tolls assigned to him, they were in the situation of mortgagors in possession, and a mortgagee cannot contend that the rents received by a mortgagor in possession are money received for his use. His proper course is to bring ejectment, or sue on the covenant to pay the principal and interest, if there is one contained in the mortgage deed.

Smythies, contra.—The declaration is good on general demurrer. The trustees, under this act, are to receive the tolls and pay the creditors rateably, discharging the interest before they pay the principal money. It is averred in this declaration that the tolls received by the trustees were sufficient to pay all the interest on all the sums advanced on the credit of the tolls, which is amply sufficient on general

demurrer. *Cane v. Chapman* (a). In *Carden v. The General Cemetery Company* (b), an averment that the company under and by virtue of the act did receive divers sums of money, out of which they might and ought to have satisfied the plaintiff, was held sufficient upon *general* demurrer. This is substantially an action for money had and received. Secondly, the trustees are personally liable to the extent of the tolls received by them; and they are bound by law to pay the interest, without being called upon to pay the principal. Thirdly, the mortgagee cannot in this case maintain ejectment, because the toll-houses and toll-gates are not to be mortgaged, but only the "tolls or duties:" and the 3 Geo. 4, c. 126, s. 49 gives to the trustees no further power to mortgage than they possessed before. [*Parke, B.*—The difficulty I have is, that there is no clause which compels the trustees to pay the interest.]

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Peacock replied.

PER CURIAM.—We think the defendant is entitled to our judgment. We do not see how the plaintiff can maintain this action against the trustees, for he has not been able to point out any clause in the act which makes it compulsory on the trustees to pay the interest. If the plaintiff could succeed at all, it would be on the count for money had and received, after notice to the trustees to pay the interest to him; but upon that we give no opinion. The plaintiff, however, may have leave to amend: otherwise

Judgment for the defendant.

(a) 5 Ad. & Ell. 647; 1 Nev. & P. 104. (b) 7 Scott, 97; 5 Bing. N. C. 253.

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May 3.

A declaration in sci. fa. stated, that the plaintiffs recovered against one B., as secretary to the Patent Rolling and Compressing Iron Company, a certain debt then due and owing from the company to the plaintiffs,

and averred that the defendants and others were, at the time of the recovery of the judgment, and from thence have been and still are, shareholders of the company. Plea, that B. was not secretary pursuant to the statute creating the company, *modo et formâ* as in the *scire facias* alleged, concluding to the country:—*Held*, first, that the plea was bad, as it traversed an allegation not contained in the declaration, concluding to the country. Secondly, that the declaration, stating a judgment to have been obtained against B., as secretary to the company, for a debt due from the company, was sufficient, and that it need not allege that B. was secretary at the commencement of the original suit, for if he were not so the proceeding would be erroneous, which the Court will not presume:—*Seemle*, that, even if he were not such secretary, the judgment having been obtained against him, the company would still be bound by it, and that if the nominal defendant collusively suffers judgment by default, the shareholders should apply to the Court to set aside the proceedings.

By the 20th section of the company's act, 4 & 5 Vict. c. lxxxix, a memorial of the names &c. of the directors, shareholders, and secretary of the company, was required to be enrolled in Chancery within six months after the passing thereof, and by the 24th section it was enacted, "that until the first memorial should have been so duly enrolled, no action or other proceeding by or against the company should be commenced or prosecuted under the authority of the act:"—*Held*, that a plea, that the company did not within six months cause to be enrolled a memorial of the names &c. of the directors and secretary for the time being of the company, and of the shareholders thereof, according to the act, was bad: for although it was a condition precedent that the names of *some* members of the company should be enrolled within six months before an action or suit was commenced, there was no condition that the names of every subsequent member should be so enrolled, and that that provision was not applicable to a proceeding by sci. fa.

Held, also, that the defendants were not at liberty to plead to the declaration in *scire facias* any matter which might have been pleaded or set up as a defence to the original action.

By the 12th section of the act, it was enacted that it should be lawful for the plaintiff to cause execution upon any judgment &c. obtained by him in any such action against any such nominal party as aforesaid, to be issued against all or any of the shareholders for the time being of the company; and that if such execution should be ineffectual &c., then it should be lawful for him to issue execution against any person who was a shareholder at the time the contract was entered into; provided, that no person having ceased to be a shareholder should be liable to the payment of any debt &c. for which he would not have been liable as a partner, and the act was not to be construed to enable any party to a suit to recover from any individual shareholder any other or greater sum than might have been recovered if that act had not been passed:—*Held*, that execution must first issue against those persons who were shareholders at the time it was issued, provided they were shareholders at the time of the contract, and would have been liable to the plaintiff if the action had been brought against them instead of the nominal defendant.

And *seemle*, that the defendants might have pleaded that they were not shareholders at the time of the contract being entered into.

BRADLEY and Others v. SIR JAMES EYRE and Another.

SCIRE FACIAS.—The declaration stated, that whereas R. Bradley, W. Burrows, &c., (the plaintiffs) by the consideration and judgment of the Court, recovered against J. C. Brettell, as the secretary to the Patent Rolling and Compressing Iron Company, pursuant to the statute made and passed in a session of Parliament holden in the 4th and 5th Vict., intituled "An act to enable the Patent Rolling and Compressing Iron Company to purchase cer-

tain Letters Patent, and to sue and be sued," a certain debt of £539 12s. 10d., then due and owing from the said company to the said R. Bradley and W. Burrows, and also £8 11s., which, in the same Court, were adjudged to the said R. Bradley and W. Burrows for their damages which they had sustained, as well on occasion of the detention of the said debt as for their costs and charges by them about their suit in that behalf expended, whereof the said J. C. Brettell, as such secretary as aforesaid, was convicted, pursuant to the statute in such case made and provided, &c. "And now, on behalf of the said R. Bradley and W. Burrows, in our said Court before the Barons of our Exchequer, we have been informed, that although judgment be thereupon given, yet execution of the debt and damages aforesaid remains to be made to them, and that Sir James Eyre, Thomas Kettrick, Moritz Platow, W. A. Urquhart, Marcus Warburg, &c., [naming the other members of the company], at the time of the recovering and giving of the said judgment, were, and from thence have been and still are, shareholders of the said company: wherefore the said R. Bradley and W. Burrows have humbly besought us to provide them a proper remedy in this behalf, and we being willing that what is just in this behalf should be done, command you (the sheriff) that by honest and lawful men of your bailiwick you make known to the said Sir James Eyre, &c., that they be before the Barons of our said Exchequer at Westminster, on &c., to shew if they have or know, or any or either of them has or knows of anything to say for themselves or himself why the said R. Bradley and W. Burrows ought not to have execution against the said Sir James Eyre, &c. for the debt and damages aforesaid, together with interest upon the said two sums of £539 12s. 10d. and £8 11s., at the rate of four per cent. per annum from the said 29th October, 1842: on which day judgment was entered up."

Pleas, first, (executionem non) because the defendants say, that the said J. C. Brettell, in the same scire facias above

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mentioned, was not secretary to the Patent Rolling and Compressing Iron Company, pursuant to the said statute made and passed in the session of Parliament holden &c., modo et formâ as in the scire facias alleged : concluding to the country.

Thirdly, (*executionem non*) because they say, that the said Patent Rolling and Compressing Iron Company in the said scire facias mentioned, was, during all the time therein mentioned, and is, a joint-stock company established, constituted, and united under and by virtue of the said statute in the said scire facias above mentioned : that the said company did not at any time within six months after the passing of the said act of Parliament, cause to be enrolled a memorial, verified as in the said act is in that behalf mentioned, of the names, residences, and descriptions of the directors and secretary for the time being of the said company and of the shareholders thereof, according to the force, form, and effect, true intent and meaning of the said act in manner and form as by the said act is in that behalf provided and enacted : that the said suit in which the said recovery was so made as in the said scire facias mentioned, and the said scire facias above mentioned, were commenced after the said period of six months after the passing of the said act had elapsed, without such memorial as aforesaid being duly enrolled in manner and form aforesaid.—Verification.

Fourthly, to so much of the said debt, damages, and interest in the said scire facias above mentioned as relates to the sum of £533 16*s.*, specified in the bill of exchange in the first count of the declaration in the record and proceedings hereinafter mentioned, and parcel of the said debt of £589 12*s.* 10*d.*, specified in the said record and proceedings, and all damages and causes of action therein mentioned in respect thereof, (*executionem non*) because the defendants say, that after the passing of the said act of Parliament in the said scire facias mentioned, the said R.

Bradley and W. Burrows instituted and prosecuted the suit and proceedings hereinafter mentioned, wherein and by virtue whereof the said debt and damages in the said scire facias mentioned were, by the consideration and judgment of the said Court of Exchequer at Westminster, recovered against the said J. C. Brettell, as therein above alleged, against the said Patent Rolling and Compressing Iron Company; and that in such suit and proceedings aforesaid the said J. C. Brettell was always the nominal defendant only, representing the said company in such suits and proceedings, and not otherwise: that the record of the said writ and proceedings, now remaining on the said rolls of the said Court of Exchequer, as in the said scire facias mentioned, hath always been and still is in the words and figures and to the effect following, that is to say: [The plea then set out the record in an action of debt brought by the plaintiffs against the company, and in which J. C. Brettell was sued as their secretary. The declaration contained a count on a bill of exchange drawn by the plaintiffs on the company, and accepted by J. C. Brettell as such secretary, and also counts for goods sold, work and labour, &c., and it appeared that judgment by nil dicit was signed on the 26th October, 1842. The plea then proceeded]: that neither on the said 26th October, 1842, when the said judgment was so signed and recovered against the said J. C. Brettell as such secretary as aforesaid, nor at any other time previous thereto, had they the defendants or either of them any knowledge or notice whatsoever, or any means of obtaining any knowledge or notice whatsoever, of the said suit and proceedings so instituted and prosecuted against the said J. C. Brettell as such secretary as aforesaid, nor had he any power or authority whatsoever from the defendants, or from either of them, to suffer the said judgment to be so recovered against him as aforesaid: and that it was never possible for them, or for either of them,

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to plead to the said action, or to defend themselves or either of them against the plaintiffs or either of them in any manner in the same action, or to do any thing in bar and preclusion thereof; and that the said judgment was so signed and recovered as aforesaid without any negligence, laches, or default whatsoever of them the defendants or of either of them, and without any authority, leave, or license from them or from either of them in that behalf, and without their consent or the consent of either of them: that they the defendants never did, nor did either of them, accept the said bill of exchange hereinafter mentioned, either by the said J. C. Brettell or by any person whomsoever, or by any person's agency, or at any time, or under any circumstances, or in any manner or form whatsoever; and that by reason of the premises, the plaintiffs (they being from the time of the commencement of the said suit in which the said judgment was so recovered and signed as aforesaid, and whereon the said *scire facias* hath been and is so grounded as aforesaid, hitherto, and still being parties thereto respectively), according to the true intent and meaning of the said statute, never could, nor could any or either of them, in any way whatsoever have recovered from the said defendants, or from either of them, either by reason of their or either of their being shareholders or an individual shareholder in the said company, or in any other way whatsoever, the said sum of money in the said bill of exchange mentioned, or any part thereof, or any damages whatsoever in respect thereof; and the plaintiffs never had, nor had either of them, any claim or demand whatsoever against the said defendants, or against either of them, for or in respect of the same bill of exchange.—Verification.

Fifthly, as to the residue of the debt, damages, and interest, a similar plea to the last.

Special demurrer to the first plea, assigning for causes,

that the action being merely for the purpose of enabling the parties sued therein to shew cause why the plaintiffs should not have execution against the defendants on the judgment obtained against J. C. Brettell as such secretary to the Patent Rolling and Compressing Iron Company, the defendants are precluded from pleading any matter in this action which might have been pleaded in the original action in which the said judgment was so recovered, and that it is therefore inadmissible for the now defendants to say that the said J. C. Brettell was not the secretary to the said company as above pleaded, since that matter might have been pleaded in the original action against the said J. C. Brettell as secretary as aforesaid, and for aught that appears to the contrary in the said plea, may have been actually pleaded, tried, and determined, or if it could not have been pleaded in the original action, the defendants should have shewn in their plea some good reason why such matter was not or could not be pleaded in the original action, whereas the said plea is so worded as to leave it uncertain what it is that the defendants really mean to deny, whether that the said J. C. Brettell was ever at any time such secretary, or that he was such secretary during the time when the proceedings in the original action were pending, or at the commencement or conclusion thereof: also, that the defendants are estopped, by the record in the original action and by the judgment recovered against J. C. Brettell as secretary, from denying that he was such secretary: also, that the plea tends to raise an immaterial issue: also, for that it traverses and attempts to put in issue a fact not alleged nor necessarily implied in the declaration or writ of scire facias: also, that the said plea should have concluded with a verification, or to the record.

Special demurrer to the third plea, assigning for causes, that this action being merely for the purpose of enabling the parties sued therein to shew cause why the plaintiffs should not have execution against the defendants herein

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on the said judgment obtained against the said J. C. Brettell, as such secretary, as in the said writ of scire facias mentioned, the defendants herein are estopped from pleading any matter in this action, which might have been pleaded in the original action in which the said judgment was so recovered, and that it is therefore inadmissible for the now defendants or any of them to say or plead that the said company did not at any time within six months after the passing of the said act of Parliament cause to be enrolled such memorial as in the said third plea mentioned, as in the said act is in that behalf provided and enacted; since that matter might have been pleaded in the original action in which the said judgment was recovered as aforesaid, and it appears on the face of the said plea that it might have been so pleaded, and for aught that appears, it may have been pleaded, tried, and determined in the original action, or if it was not or could not have been so pleaded in the original action, then the said defendants should have stated and shewn in their said plea some good reason why such matter was not or could not be pleaded in the original action: and also, for that, after the said company have suffered the plaintiffs to recover the said judgment against the said J. C. Brettell, as secretary as aforesaid, in an action founded upon the said statute, it is too late for the now defendants or any of them to plead such matter as aforesaid as a reason why execution should not issue on the said judgment, and for that by pleading such matter the said defendants are taking advantage of their own wrong: and also, for that the plea sets up as a defence a matter which is immaterial to this action, viz. that the said company did not at any time within six months after the passing of the said act cause to be enrolled such memorial as aforesaid, whereas, if the said company caused the said memorial so to be enrolled after the said period of six months and before the commencement of the said original action, it was sufficient to entitle the plaintiffs to commence

and prosecute the said original action under the authority of the said act of Parliament: and also, for that the clause in the said act of Parliament prohibiting actions and proceedings against the company until the first memorial shall have been enrolled in manner as the said act requires, does not apply to a scire facias against individual shareholders for having execution against them of a judgment obtained against the company in the name of their secretary: and also, for that the said plea is double, and sets up not merely in the former part of the plea that the said memorial was not duly enrolled by the company within six months after the passing of the said act, but also in the latter part of the plea that it was not duly enrolled when the said original action and the said scire facias were commenced, that is to say, after the lapse of the said period of six months, which is another matter of answer or defence: and also, for that the concluding sentence of the said plea next preceding the verification is ambiguous and uncertain, and leaves it in doubt whether the defendants thereby mean to say that no such memorial had been duly enrolled at the time when the original action and scire facias were commenced, or that such memorial had not been duly enrolled within the six months after the passing of the act, so that the plaintiffs cannot safely take issue on either of those allegations.

Special demurrer to the fourth plea, assigning for causes, that the said defendants are estopped, by the record of the judgment and proceedings in the original action set out in the plea, from pleading the matters therein pleaded; it not being denied in the said fourth plea that the said J. C. Brettell was the secretary to the said company as mentioned in the said record, nor that the said defendants were shareholders of the said company, in manner and form as mentioned in the said writ of scire facias: that the said defendants are either parties or privies to the said judgment, and to the said original action; and that they

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are precluded from denying that the said company accepted the bill mentioned in the first count of the declaration in the said record, in manner and form as in that count alleged; in which case, the defendants, as such shareholders of the said company, are liable to execution at the suit of the plaintiffs on the said judgment, by force of the statute mentioned in the said writ of scire facias, even though the said defendants, or either of them, could never have been sued individually as acceptors of the said bill, either alone or jointly with any other person or persons, and even though the said defendants had no connexion with the said company till after the said bill was accepted and dishonoured, and even though the whole of the facts alleged in the said plea be true: and also, for that the whole of the said plea is founded upon the erroneous assumption that no shareholder of the said company is liable to execution upon the said judgment, who would not have been liable to be sued for the debts recovered in the said original action, or part of them, in an action at common law not founded upon the said statute: and also, for that the allegation in the said fourth plea, to the effect that the said defendants had no knowledge or notice, or any means of obtaining any knowledge or notice, of the said suit and proceedings against the said J. C. Brettell as such secretary as aforesaid, is either argumentative, and contrary to the record set out in the said plea, and to the estoppel apparent thereon, as being in effect a denial that the said company, or the said J. C. Brettell as such secretary as aforesaid, had such knowledge or notice as aforesaid, or such means of obtaining the same; or else, if it is not intended thereby to deny that the said company, or the said J. C. Brettell as secretary thereof, had such knowledge or notice, or means of obtaining the same, but only that the said defendants, or either of them, had it, then the said allegation is immaterial and irrelevant, or amounts to a traverse of a matter of law, since notice of the said action

to the said company, or to the secretary thereof as such, was notice in law to the shareholders of the said company, so far as any such notice was requisite; and, since it is not pretended in the said plea that the defendants were not such shareholders at the time of the commencement, and during the pendency, of the said original action: and also, for that it is utterly immaterial to this action whether or no the said defendants ever had, or had not, any such notice or knowledge as aforesaid, or means of obtaining it, either in law or fact, provided only they were shareholders of the said company at the times of recovering the said judgment, and of issuing the said writ of scire facias, or even at the time of the issuing of the said scire facias only, which is not denied in the said plea: and also, for that the allegation in the same plea, that the said J. C. Brettell had no power or authority from the said defendants, or either of them, to suffer the said judgment to be so recovered against him as therein mentioned, is either argumentative, as being in effect a denial that the said J. C. Brettell had any such power or authority from the said company, in which case it is a traverse of a matter of law, and of the effect of the statute aforesaid, or is an argumentative denial that Brettell was such secretary as aforesaid, which the defendants cannot be allowed to plead, and which the record concludes the defendants from denying; or else it admits that Brettell, as secretary as aforesaid, had such power and authority from the said company, and merely denies that he had such power and authority from the defendants, or either of them, as individuals, in which case the said allegation is repugnant, immaterial, and irrelevant, as the said defendants have not denied that they were shareholders of the said company when the said judgment was suffered and recovered as aforesaid, and amounts to a negative pregnant with an affirmative, viz. that Brettell had such power as aforesaid from the said company: and also, for that it is immaterial to this action

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whether or no Brettell ever had any such power or authority from the defendants, or either of them, provided only they were shareholders of the said company at the times of recovering the said judgment, and of issuing the said writ of scire facias, or even at the latter of those times only, which is not denied in the said plea: and also, for that the said original action and judgment are, in legal effect, an action and judgment against the said company; and that the said judgment was, in consideration of law, suffered by the said company, and not by the said Brettell; and it is, therefore, immaterial whether he had any power or authority to suffer the same: and also, for that, inasmuch as it appears by the record set out in the said fourth plea that the said company, or the said J. C. Brettell, as the secretary thereof, had the opportunity of pleading to and defending the original action, and appeared and suffered judgment by default therein,) which facts the defendants are estopped from denying, and which are not denied in the said plea, and are conclusively shewn by the said record,) the allegations in the said plea, that it was never possible for the defendants, or either of them, to plead to the said action, or to defend themselves, or either of them, against the plaintiffs, or either of them, in any manner in the same action, or to say anything in bar or preclusion thereof, and that the said judgment was so signed and recovered as aforesaid, and without any negligence, laches, or default whatever of them, or either of them, and without any authority, leave, or license, from them, or either of them, and without their consent, or the consent of either of them, particularly as the defendants have not denied in the said plea that they were shareholders in the said company during the pendency of the said original action, either tend to bring in issue before a jury a mere matter of law, viz. whether the acts, powers, and defaults of the said company, or of the said J. C. Brettell, as secretary thereof, in the said original action,

are not the acts, powers, and defaults of the shareholders of the said company, or binding upon them, or else are wholly immaterial and irrelevant in this action: and also, for that the said fourth plea is double and multifarious, in this, that, after shewing that the defendants never accepted the bill in the said fourth plea mentioned, it also alleges that the plaintiffs never had any claim or demand whatsoever against the defendants, or either of them, for or in respect of the same bill, which is another ground of answer or defence: and for that the last-mentioned allegation is also uncertain, too general, and wants particularity; and it ought to have been shewn why, and how, and by reason of what facts, the plaintiffs had no such claim or demand as aforesaid.

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The following were the defendants' points of argument:—

1st. The defendants will contend that, inasmuch as the 24th section of the stat. 4 & 5 Vict. c. lxxxix expressly enacts that "no action or other proceeding by or against the company shall be commenced or prosecuted under the authority of that act until the first memorial shall have been duly enrolled as directed thereby," the third plea (which resembles the common form in pleading, the non-enrolment of annuity deeds) sufficiently shews that the memorial required by the act has never been enrolled, and, as this is confessed by the demurrer, that the said defendants are not liable to the present proceedings.

2ndly. The defendants will also contend that, under the state of facts confessed by the demurrers to the fourth and fifth pleas, they are not liable to be sued in these proceedings, because the present scire facias can only be prosecuted by virtue of the 4 & 5 Vict. c. lxxxix, the 12th section of which expressly enacts that nothing shall be recovered from an individual shareholder of the company by virtue of that statute, which might not have been recovered from him had the statute not been passed: that the fourth and

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fifth pleas shew directly and not argumentatively that the present demand could never have been recovered from the said defendants as individual shareholders of the company, had the said statute never been passed, and that, consequently, unless the concluding words of the 12th section of the said statute (which are not contained in the Bankers Act, 7 Geo. 4, c. 46) can be read as if they were not inserted in the act of Parliament, they are not liable to have execution issued against them.

3rdly. That the *scire facias* is void, in not pursuing the terms of the judgment confessed by the demurrers.

On the part of the defendant Platow, it was further stated as a point for argument, that the declaration is bad, for not stating that Brettell was secretary to the company, or that he was described as such in the former action, or that he was sued as representing the company.

Martin, in support of the demurrer, was stopped by the Court.

Butt, for the defendant Eyre and another.—This is a proceeding to render the defendants liable to a judgment obtained against a third person, as secretary to a company of which the defendants were shareholders; and the first plea in substance is, that the defendant was not secretary of the company at the time when by the act of Parliament it was requisite that he should be, for the purpose of bringing the action against him as such. That is the only time that is material; and it in effect denies that he was secretary at the time the action was brought. Such a plea would have been a good answer to the original action, and, if the judgment were obtained against a party who was not in fact secretary at the time, it is a good answer to it, and being in the negative, it properly concludes to the country. [*Parke*, B.—The plea is clearly bad, for it traverses an averment which is not to be found in the *scire facias*, and

concludes to the country.] Such an allegation must be implied, otherwise the writ is bad for not shewing that he was secretary at the time of the action being brought. [*Parke, B.*—It should at any rate have been pleaded specially, and concluded with a verification.] Then as to the fourth and fifth pleas. Those pleas are founded on the concluding part of the 12th section of the stat. 4 & 5 Vict. c. lxxxix; that section gives the plaintiff power to cause execution upon any judgment, decree, or order obtained by him in any such action or suit against any such nominal party as aforesaid, to be issued against all or any of the shareholders for the time being of the company, and if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby, then it shall be lawful for him to cause execution to be issued against any person who was a shareholder of the company at the time the contract was entered into upon which such action or suit shall have been instituted; and by the latter part of that section it is provided, “that no person, having ceased to be a shareholder of the company, shall be liable for the payment of any debt for which any such judgment, decree, or order shall have been obtained, for which he would not have been liable as a partner in case a suit had been originally brought against him for the same; nor shall this act be deemed to enable any party to a suit to recover from any individual shareholder of the company, or any other person whomsoever, any other or greater sum than might have been recovered if this act had not been passed.” Those pleas in substance amount to this, that the sums alleged to have been recovered by the judgment were debts for which the defendants, as shareholders, could not be liable. Even supposing that the directors of the company had accepted bills of exchange on account of the debts of the company, the individual shareholders would not be necessarily liable on such bills, as the directors had no implied authority to bind the shareholders by accepting bills. The plea states that it was a debt for which the individual shareholders

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would not be liable, and therefore they individually would have had a good defence to the original action ; and, as they had no means of pleading that defence, it is a good plea to the *scire facias*. It never could be intended that it should not be competent for a shareholder to plead any thing which would have been a defence to the original action.

Martin, in reply.—The twelfth section makes it lawful for the plaintiff to cause execution to be issued against any shareholder for the time being of the company, subject to a proviso that he shall not be liable for the payment of any debt for which he would not have been liable as a partner, in case the suit had been originally brought against him for the same ; nor for any other or greater sum than might have been recovered if that act had not passed. That means that he is to be subject to the same liabilities as he would be subject to in case that act had not passed ; but there is nothing to shew that the defendants would not have been liable as members of the company if the act had not passed. They would be so liable if they were members of the company at the time of the execution, or of the contract being entered into. [*Parke, B.*—The act says, that execution may be issued against persons who were shareholders at the time of the execution, or against those who were so at the time of the contract. It is not inconsistent to say that execution shall not be taken out against a person who has ceased to be a shareholder, unless he was also a shareholder at the time the contract was entered into.]

Cowling, for the defendant *Platow*.—The third plea is a good answer. It states that the company did not, within six months after the passing of the act, cause to be enrolled a memorial of the names, residences, and descriptions of the directors and secretary for the time being of the said company, and of the shareholders thereof, according to the act. Now, the 20th section of the act provides, that,

within six months after the passing of the act, the company shall cause to be enrolled in the High Court of Chancery a memorial of the names, residences, and descriptions of the directors and secretary for the time being of the company, and of the shareholders thereof; and the 24th section enacts, that, until the first memorial shall have been duly enrolled, no action or other proceeding by or against the company shall be commenced or prosecuted under the authority of that act. This plea sufficiently shews that the memorial required has never been enrolled. [*Parke, B.*—The meaning of the statute is, that the company shall have no right to sue until after the memorial has been enrolled. It only makes the enrolment of some memorial a condition precedent to the act of suing or being sued: but that is inapplicable to a scire facias against individual shareholders, for having execution against them on a judgment obtained against the company.]

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Then, as to the plea that Brettell was not secretary. It is said that that is a bad plea, because it traverses an averment not to be found in the scire facias: but if this plea is bad on that account, then the declaration is also bad. The 5th section of the statute enacts, that in all actions, suits, or other legal proceedings to be instituted or prosecuted against the company, it shall be sufficient to state the name of the secretary for the time being of the company, as the nominal defendant representing the company in such proceedings; therefore the proceeding must be against the person who was the public officer at the time of the commencement of the suit; but this record does not shew that Brettell was secretary when the original action was commenced, and it is therefore bad. The declaration in scire facias only states that the plaintiffs recovered a judgment against him *as* the secretary of the company: it ought to have shewn that he was the secretary when the original action was commenced. In *Noell v. Nelson (a)*, where the entry of a de-

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claration in scire facias on a judgment of assets in futuro is given, the form shews how the defendants were impleaded, namely as executors, and it states them to be executors. So here, the plaintiffs ought to have shewn that Brettell was the secretary in point of fact. In *Soulby v. Smith (a)*, where a dock company were sued by their treasurer, and the declaration omitted to describe him as treasurer, the plaintiff was nonsuited, on the ground that a judgment against him in such an action would make him personally liable. The declaration here does not shew in what character Brettell was sued. [*Parke, B.*—The objection is, that if the original judgment was not binding upon the company, you should have pleaded specially.] The plaintiffs ought to shew a good cause of action on the face of their declaration, and enough of the original record should be set out to make it appear that the plaintiff has a good right to proceed by scire facias. In a scire facias at common law, it is sufficient to shew a judgment against C. D. the defendant, without more; but here the scire facias is a new proceeding given by statute, which only authorizes proceedings upon a judgment obtained against the secretary; and the plaintiffs ought to shew that in the former action that fact was in issue, so that it might have been traversed. It is here stated only that the plaintiffs sued Brettell “as secretary,” which words are immaterial. They should have shewn that they sued him as representing the company. [*Parke, B.*—Is there any instance of a scire facias which recited a fact independently of the record? Surely this is sufficient. It is only necessary to recite so much of the record as shews a recovery against Brettell as secretary. In truth the company are the defendants, and a change of secretary in the mean time would not affect the proceedings. Is it not to be inferred that Brettell was the secretary at the time of the commencement of the original action, and that judgment was

(a) 3 B. & Ad. 929.

recovered against him as the secretary, otherwise we must infer it to be erroneous?] It is submitted that no inference should be made either one way or the other, but that the plaintiffs should make out their case. If Brettell was not sued as the secretary, the defendant is not liable.

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Martin, in reply.—In Com. Dig. Pleader (3 L. 10), it is said, the defendant cannot plead “a thing which proves the judgment erroneous and voidable.”

PARKER, B.—This is a scire facias in the usual form: it states that the plaintiffs recovered against a person of the name of Brettell, as secretary to the Patent Rolling and Compressing Iron Company, a certain debt then due and owing from the said company to the plaintiffs; and it avers that the defendants and other persons named were, at the time of the recovery of the judgment, and from thence have been and still are, shareholders of the company. The defendants have pleaded four pleas, which have been demurred to. The first is, that Brettell was not secretary *modo et formâ*. That may be disposed of, by stating that it is a plea concluding to the country, professing to traverse an allegation which is not to be found in the declaration. Mr. *Cowling* objected to the declaration as bad, because it contains no averment that the proceedings were had against a person who was secretary to the company at the time of suing out the writ in the original action. We think there is no foundation for that objection. The declaration states a judgment, which is averred to have been obtained against Brettell, as the secretary of the company, for a debt due from the company. It is true that it does not appear on the face of the declaration that Brettell was secretary at the time of the commencement of the suit; but we have no right to presume that the proceedings are erroneous or objectionable. Unless the proceedings are against a person who was secre-

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tary at the time of the commencement of the suit, the judgment is erroneous and irregular. We cannot presume that Brettell was not secretary at the time of the commencement of the suit; and therefore that objection cannot prevail. If any advantage could be taken of the argument that Brettell was not secretary at the time of the commencement of the suit, the defendants ought to have raised it by a proper plea; it is enough to say there is no such plea. In point of fact, this is a mere proceeding for enabling the creditor to obtain his debt from the shareholders; and even if the person sued was not secretary, my notion is that the company are still bound by the judgment. If the nominal party collusively suffers judgment to be entered against him, and the shareholders are taken by surprise, they should apply to the Court to set aside the proceedings. It is sufficient to say that, upon this record, the plea affords no answer.

Then the third plea is, that no memorial was enrolled within six months, as required by the act of Parliament. That plea treats the enrolment of the memorial as a condition precedent, which it clearly is not. It is, undoubtedly, a condition precedent that the names of *some* members of the company should be enrolled; for the 24th section of the 4 & 5 Vict. c. lxxxix, enacts, "that until the first memorial shall have been duly enrolled in manner by this act directed, no action or other proceedings by or against the company shall be commenced or prosecuted under the authority of this act;" but it certainly is no condition precedent that the names of every subsequent member should be enrolled within six months.

The fourth and fifth pleas are both pleas that the defendants were not liable to the demand which the plaintiffs recovered against Brettell. The question is, whether the defendants have a right to plead such pleas to a *scire facias*, inasmuch as they are pleas which the persons who were partners at the time might have set up in answer to the

original action. The rule of law is well settled, that you cannot plead to a scire facias any matter which might have been set up as a defence to the original action. It is said that the rule applies only to parties or privies; but admitting that to be so, we are of opinion that these defendants must be so considered. It is argued, that the defendants have a right to set up this defence upon the construction of the 12th section of the statute. That section is obscurely worded, but I am of opinion that under it they have no such right: it enacts, "that it shall be lawful for the plaintiff to cause execution upon any judgment, decree, or order obtained by him in any such action or suit against such nominal party as aforesaid, to be issued against all or any of the shareholders for the time being of the company, and if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby, then it shall be lawful for him to cause execution to be issued against any person who was a shareholder of the company at the time the contract was entered into upon which such action or suit shall have been instituted." The words "for the time being" mean at the time execution is sued out. Then comes this proviso: "that no person, having ceased to be a shareholder of the company, shall be liable for the payment of any debt for which such judgment, decree, or order shall have been so obtained, for which he would not have been liable as a partner in case a suit had been originally brought against him for the same; nor shall this act be deemed to enable any party to a suit to recover from any individual shareholder of the company or any other persons whomsoever any other or greater sum than might have been recovered if this act had not passed." We are disposed to hold the meaning of the section to be this:—You must first take out execution against those persons who are shareholders at the time the execution issues, provided they were shareholders at the time of the contract, and would have been liable to the debt in case

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the action had been brought against them and not against a nominal defendant. That section only authorizes the parties to say that they were not shareholders at the time the contract was entered into; it does not enable them to set up as a defence any matter which the company themselves could set up. I am disposed to think that the defendants might have pleaded, that at the time of the contract on the bill of exchange they were not shareholders, although they were at the time the *scire facias* issued. But that is not the plea in the present case. There must be judgment for the plaintiffs.

ALDERSON, B., and ROLFE, B., concurred.

Judgment for the plaintiffs.

May 3.

BRADLEY and Others v. WARBURG, sued with others.

By an act (4 & 5 Vict. c. lxxxix), incorporating the Patent Rolling and Compressing Iron Company, it was provided, that every judgment against the nominal defendant might be executed against the person and estate of every shareholder, provided

"that no such execution should issue without leave first granted by the Court in which such judgment should have been obtained upon motion in Court, and after notice of motion:"—*Held*, that the issuing of a *scire facias* without the leave of the Court could not be pleaded as a defence in bar of the action, but was an irregularity merely, for which an application might be made to the Court to set aside the writ.

SCIRE FACIAS against a shareholder of the Patent Rolling and Compressing Iron Company, on a judgment recovered against the secretary of the Company (*a*).

Plea, executionem non, because the defendant says, that although he was, at the time of the recovery and giving of the said judgment, and from thence has been, and still is, a shareholder of the said company as in the said declaration mentioned, yet execution ought not to be issued against him as a shareholder, according to the form and effect of the said recovery and the said statute in the de-

(*a*) See the declaration set out in *Bradley v. Eyre*, ante, p. 432.

claration mentioned, because he says that such leave as by the said statute is in that behalf required, had not at any time before the issuing of the said writ of scire facias in the said declaration mentioned, and has not hitherto at any time, been granted upon motion in open Court by the said Court of Exchequer, in which the said judgment was obtained as in the said declaration mentioned, in manner and form as in and by the said statute is in that behalf required, nor has any leave for the issuing of the said writ of scire facias, or for the issuing execution against the said Marcus Warburg upon the said judgment, been hitherto granted by the said Court of Exchequer upon motion in open Court, of all which premises the said R. Bradley and W. Burrows had at all times due notice. Verification.

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Special demurrer, assigning the following causes : that, if such leave for issuing the said writ of scire facias, or for issuing execution against the said Marcus Warburg, as by the said statute in that behalf is required, hath not been granted upon motion in open Court by the Court in which judgment was recovered, the want of such leave is only matter of irregularity, and a cause for setting aside the writ on motion, but does not constitute any sufficient answer to the declaration, after the defendant has appeared and pleaded to the said writ of scire facias and declaration thereon ; and that after having appeared thereto, he is precluded from denying that the said writ was regularly issued, or from alleging that it was issued without such leave obtained ; and also, that no such leave to be obtained as aforesaid was necessary before issuing the said writ of scire facias, but only before issuing a writ of execution, and therefore it was not necessary to obtain such leave before the pleading of the plea.

Joinder in demurrer.

Martin, in support of the demurrer, was stopped by the Court, who called upon

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Peacock to support the plea.—The question is, whether the plea affords a substantial defence to the action, or shews a mere irregularity, for which the defendant should have applied to the Court to set the writ aside. It is submitted that it is a substantial defence to the action. The statute 4 & 5 Vict. c. lxxxix, s. 11, enacts, “that every judgment, decree, or order of any Court of justice in any proceeding against any such nominal party as aforesaid, may be lawfully executed against, and shall have the like effect on, the estate, funds, and property of the company, and, subject to the restrictions hereinafter enacted, upon the person, estate, funds, and property of every shareholder thereof, as if every individual shareholder had been by name a party to such proceeding.” And the 11th section enacts, “that it shall be lawful for the plaintiff to cause execution upon any judgment, decree, or order obtained by him in any such action or suit against any such nominal party as aforesaid, to be issued against all or any of the shareholders for the time being of the company; and if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby, then it shall be lawful for him to cause execution to be issued against any person who was a shareholder of the company at the time the contract was entered into, upon which such action or suit shall have been instituted: provided always, that no such execution against any person being or having ceased to be a shareholder, shall be issued without leave first granted by the Court in which such judgment, decree, or order shall have been obtained upon motion in open Court, and after notice of such motion given to the person sought to be charged.” So that, by this statute, it appears that though the action is to be brought against the nominal party, yet execution may be issued against the funds of the company; and it seems but reasonable that the judgment-creditor should endeavour to make the funds of the company available for the purpose

of satisfying his debt, before he proceeds against the individual shareholders. The legislature has therefore provided, that he shall make application to the Court for leave to issue execution; and if such application had been made here, the Court would probably have refused it, until it were shewn that the creditor had endeavoured first to enforce the judgment against the funds of the company, before he endeavoured to obtain payment from the individual shareholder. The statute points to three classes of property as subject to the execution: first, the estate, funds, and property of the company; if that should not be effectual, then execution is to issue against all or any of the shareholders for the time being; and if that execution is ineffectual, then execution is to issue against any person who was a shareholder at the time of the contract being made or entered into. [*Parke, B.*—The question is, whether this is only the subject of an application to set aside the proceedings for irregularity. The presumption is that a scire facias is founded upon record; it states the recovery of a judgment, and calls on the defendant to shew cause why execution should not issue. This plea admits the judgment, and only states matter which is preliminary to the issuing of the writ of scire facias. We ought to endeavour, as far as we can, to make the sci. fa. issued under the statute conformable to the old course of proceedings in scire facias.] This is not a thing required to be done by the practice of the Court, but by act of Parliament and the law of the land. That distinction is pointed out by *Holroyd, J.*, in giving his judgment in *Sandon v. Proctor* (a):—"There is a material distinction between those things which are required to be done by the common or statute law of the land, and things required to be done by the rules or practice of the Court. Any thing required to be done by the law of the land must be noticed by a Court of error: but

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a Court of error cannot notice the practice of another Court."

PARKE, B.—The question turns on the construction of the act of Parliament, which provides, by section 12, "that no such execution against any person being or having ceased to be a shareholder, shall be issued without leave first granted by the Court in which such judgment, decree, or order shall have been obtained, upon motion in open Court, and after notice of such motion given to the person sought to be charged." Does that mean that the party shall be deprived of his execution, unless an application has been made to the Court before the *scire facias* issued, (for which we can find no precedent), or does it mean that the omission is an irregularity for which an application should be made to the Court to set aside the writ? We think it is a mere irregularity only, and therefore there must be judgment for the plaintiff.

ALDERSON, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

May 3.

BRADLEY and Others v. URQUHART and Another.

To a declaration in *sci. fa.* against a shareholder of a company on a judgment recovered against B. as the secretary of the company, the defendant

SCIRE *facias* against certain shareholders of the Patent Rolling and Compressing Iron Company, on a judgment recovered against J. C. Brettell as the secretary of the company (*a*).

Plea (*executionem non*), because the defendants say that no memorial, verified as in the said act of Parliament, in the

pleaded, that no memorial of the names, residences, and descriptions of the directors and secretary had ever been duly enrolled in the Court of Chancery, in the manner required by the act:—*Held*, that the plea was bad, as setting up a defence which might have been pleaded to the original action.

(*a*) See *Bradley v. Eyre*, ante, p. 432.

said writ mentioned, is in that behalf mentioned, of the names, residences, and descriptions of the directors and secretary for the time being of the said Patent Rolling and Compressing Iron Company in the said writ of scire facias above mentioned, and of the shareholders thereof, has ever been duly enrolled in the High Court of Chancery, in manner by the said act of Parliament in that behalf directed, according to the force, form, and effect of the said statute.—Verification.

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Special demurrer, assigning for causes, amongst others, that the action of scire facias being merely to enable the parties sued to shew cause why the plaintiffs should not have execution against them, the defendants were estopped from pleading matter in this action which might have been pleaded in the original action (a).

The following were the plaintiffs' objections to this plea, which accompanied the demurrer-book:—

The plaintiffs object, that the matter of this plea might and should have been pleaded in the original action, and cannot be pleaded to a scire facias to have execution of a judgment in the original action: also, that the same may have been pleaded, tried and determined in the original action, for aught that appears: also, that the defendants are estopped by the judgment in the original action from denying that the company enrolled the memorial as required by the act of Parliament: also, that the plea only shews a reason why judgment should not have been obtained in the original action, and not why execution of the judgment should not be awarded against the defendants, whereas the writ of scire facias only calls on the defendants to shew why plaintiffs should not have execution of the judgment against the defendants: also, that defendants are taking advantage of their own wrong by pleading the non-enrol-

(a) See the causes of demurrer fully stated in *Bradley v. Eyre*, ante, p. 437.

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ment of the memorial according to the act of Parliament : also, that the clause of the act prohibiting actions and proceedings against the company before the enrolment of the first memorial, does not extend to this scire facias to have execution against shareholders on a judgment already obtained against the secretary of the company : also, that the allegation of the non-enrolment of the memorial is too general, and the plea should have pointed out the defect relied on, whether that no memorial was enrolled, or that there was some, and what, defect in the mode or time of enrolment : also, that the allegation of the non-enrolment of the memorial should have been so framed that an issue taken on it, and found either for the plaintiffs or the defendants, would have been material and decisive.

Martin, in support of the demurrer.—The plea is bad in substance. It admits that the judgment has been rightly obtained against the secretary, but states that which might have been a defence to the original action, but is no cause against the issuing of the execution. It is a well-established rule, that a defendant cannot plead to a scire facias any matter which would have been a defence to the original action.—He was then stopped by the Court, who called upon

Kelly, to support the plea.—The plea is good in substance. It is said that it admits a valid judgment, but it does not: the plea is, that the judgment is absolutely void by the 24th section of the act, which provides that until the memorial shall have been enrolled, no action or proceeding shall be commenced. The stat. 4 & 5 Vict. c. lxxxix, s. 20, enacts, "that within six months after the passing of this act, the company shall cause to be enrolled in the High Court of Chancery a memorial, verified as hereinafter mentioned, of the names, residences, and descriptions of the directors and secretary for the time being

of the company, and of the shareholders thereof; and when any new director or secretary shall be appointed, the company shall, within three months from the happening of such an event, cause to be in like manner enrolled a memorial of the name, residence, and description of every such new director or secretary, specifying in whose places they shall respectively have been appointed; and when any persons shall cease to be shareholders of the company, or when any other persons shall be admitted shareholders of the company, the company shall, within three months from the happening of such an event, cause to be enrolled in like manner, a memorial of the name, residence, and description of every person so ceasing to be a shareholder of the company, and of every person so admitted to be a member thereof." Then the 21st section enacts, "that all or any of the particulars aforesaid may be contained in the same memorial." And the 22nd section provides, that the several memorials shall be in the form or to the effect expressed in the schedule annexed to the act, and shall be signed by the secretary or one of the directors of the company, and shall be verified by a declaration of such secretary or director before a Master of the High Court of Chancery. The legislature has been thus strict in requiring a memorial to be enrolled, in order to afford protection to shareholders, for then they would have an opportunity of seeing who is the secretary; but if there be no memorial, the shareholder will have no opportunity of protecting himself. It was evidently intended that the company should not be sued except through the secretary or directors; but if the requisite memorial be not enrolled, actions may be brought and judgments obtained against paupers, and the shareholders made responsible on those judgments. The mode of proceeding against the company being one given by this act of Parliament, its provisions should be strictly complied with.

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PARKE, B.—I am of opinion that the plea is clearly bad, as containing matter which might have been pleaded and been a good defence to the original action. A defendant cannot plead to a scire facias what he could have pleaded to the original action, otherwise there would be no end of the proceedings. Though the particular mode of obtaining execution against the shareholders of this company is given by the act of Parliament, yet the proceeding does not differ from the ordinary scire facias, to which a defendant can only plead matters which do not impeach the judgment. I do not, however, say that a scire facias of this description cannot, under any circumstances, be impeached; no doubt it may on the ground of fraud, but in that case the proper course might, perhaps, be to apply to the Court to set aside the writ. But here it is sufficient to say that there is a good judgment against the company, and upon these pleadings the defendants admit that they are shareholders. It was competent for the defendants to deny that they are members of the company, for such defence is not inconsistent with the judgment, but if they intended to rely on their present defence, they should have resorted to it in the first instance. It would be contrary to all principle to permit the matter to be again litigated.

ALDERSON, B.—Suppose in the original action the defendant had pleaded that no memorial had ever been enrolled, and the jury had found that a memorial had been enrolled, is it to be permitted that it should be pleaded again to the scire facias? I think clearly not.

ROLFE, B., concurred.

Judgment for the plaintiffs.

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CLOWES and Others v. BRETTELL, (*in re* BATTY and RYTON).

May 4.

WILLES moved for a *scire facias* in order to have execution against William Batty and William Ryton, as having been members of the "Patent Rolling and Compressing Iron Company" at the time when the contract was entered into with the plaintiffs upon which this action was brought. The 20th section of the company's act (4 & 5 Vict. c. lxxxix) directed, that the company should cause to be enrolled in the Court of Chancery a memorial of the names, residences, and descriptions of the members of the company: and the 32nd section enacted, that all the costs and expenses attending the applying for, obtaining, and passing that act, should be paid out of the funds of the company, in preference to all other payments whatsoever. It appeared from the affidavits on behalf of the plaintiffs, that the memorial enrolled in Chancery, in pursuance of the act, contained the names of *John Batty*, carrier, Wolverhampton, and also of William Ryton: and it was sworn that the name of the said William Batty was inserted in the said memorial, "but which said *William Batty* is by mistake called and inserted in the said memorial as *John Batty*." The defendants' affidavit stated, that "there is no such person as William Batty who is a shareholder in the said company, or who had any transactions or dealings

By an act of Parliament for creating a joint stock company, (the Patent Rolling and Compressing Iron Company) it was enacted, that the company should cause to be enrolled in Chancery a memorial of the names, residences, and descriptions of the shareholders of the company. Another clause provided, that the expenses of applying for and obtaining the act should be paid out of the funds of the company, in preference to all other payments whatsoever. The memorial enrolled under the act contained the names of *John Batty*, carrier, of Wolver-

hampton, and of William Ryton, and on an application for a *scire facias* to have execution under the act against *William Batty* and William Ryton, in an action for an expense incurred in obtaining the act, it was sworn on the part of the plaintiff, that the defendant William Batty was by mistake called and inserted in the memorial as John Batty: for the defendants, it was sworn that there was no such person as William Batty who was a shareholder of the company, and also that the other defendant Ryton was not a shareholder. Notice had been given to the defendants that the Court would be moved that an execution might issue against them:—

Held, 1st, that the allegations of the defendants were no answer to the application for a *scire facias*; 2nd, that the remedy of the plaintiffs was not against the funds of the company only, but that they had a right of action against the individual shareholders; and 3rdly, that the defendants, having received notice that an execution (not a *scire facias*) would be moved for, were entitled to their costs of appearance, unless they shewed cause on the merits.

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whatever with the said company. The defendant Ryton also stated in his affidavit, that he was not a shareholder. The debt for which the plaintiff sued was incurred for printing, &c. in the course of soliciting the act of Parliament. Notice had been given to Batty and Ryton, that the Court would be moved that an execution might issue against them. A rule having been granted,

J. Wilde, for Batty, and *Whitmore*, for Ryton, shewed cause in the first instance.—This rule ought to be discharged on several grounds: First, it is sworn, on the part of Batty, that no such person as “William Batty” is a shareholder in the company; and Ryton also alleges that he is not a shareholder. Secondly, the plaintiffs’ demand, being for an expense incurred in obtaining the act, ought, under the 32nd section, to be satisfied out of the general funds of the company, and not by the individual members. Again, it does not appear but that the plaintiffs have been satisfied by previous executions issued against other shareholders. For instance, no account is given of the result of the execution issued against one Welby, a shareholder, as appears from the former case of *Clowes v. Brettell* (a). These parties are at all events entitled to the costs of their appearance upon this rule, for the notice given to them is not that a *scire facias* will be applied for, but that the Court will be moved for *execution* to issue against them. [*Parke*, B.—Unless they had shewed cause on the merits, they would have been entitled to the costs of appearing, but not of the affidavits.]

Willes, in support of the rule.—It does not appear by affidavit that any *scire facias* was issued against Welby: and the plaintiffs’ affidavit states, that the defendants are

(a) 10 M. & W. 506.

now indebted, and that the debt now remains due and owing.—He was stopped by the Court.

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PARKE, B.—This rule for a scire facias must be made absolute. If the allegation that these parties are not really shareholders be true, they may plead it to the scire facias, and they will be safe. Secondly, there is nothing in the act to prevent the plaintiffs from proceeding against the individual members of the company for this debt. The enactment, that the expenses incurred in obtaining the act are to be paid out of the funds of the company in preference to all other payments, is merely a direction to the company as to the debts which they are first to discharge: but a person who is their creditor for expenses incurred in obtaining the act is not to be in a worse position than other creditors, because the company are guilty of a violation of their duty in not paying him before other creditors.

ALDERSON, B.—I am of the same opinion. The memorial describes as a shareholder one *John Batty*, a carrier, living at Wolverhampton. If the defendant Batty be not that person, nothing would be easier than for him to state that he is not a carrier, and that he does not reside at Wolverhampton; but in the absence of any such statement, we must assume that William Batty and John Batty are the same person, and that John Batty was a shareholder at the time of this contract. Then, with respect to the averment of Ryton that he is not a shareholder, it is to be observed that his name appears as a shareholder upon the memorial, and that he does not state the grounds of his considering himself as no longer a shareholder. If it be that he has parted with his shares, he does not cease to be liable, unless he has caused the name of his transferee to be inserted in the memorial.

ROLFE, B., concurred.

Rule absolute.

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May 6.

A rule, on the part of the Attorney-General, to amend an information at the suit of the Crown, is absolute in the first instance.

THE ATTORNEY-GENERAL *v.* RAY and Others.

THIS was an information filed at the suit of the Attorney-General, for the breach of a covenant to repair certain premises held under the Crown.

The *Attorney-General*, on the preceding day (May 5), applied for leave to amend the information; and, upon stating that notice had been given to the defendants of the intended application, he obtained a rule calling upon them to shew cause peremptorily on this day, why the amendment should not be made.

Swann now appeared to shew cause against the rule; but—

PARKE, B. said—We have looked into the books, and we find from the authorities that the *Attorney-General* is entitled to have this amendment made without a rule to shew cause. The Court will now, therefore, grant a rule absolute in the first instance, on payment of costs, in order that the granting of a rule to shew cause in this instance may not be drawn into a precedent.

Rule absolute accordingly (a).

(a) See *Att.-Gen. v. Smith*, 5 M. & W. 372.

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MACDONALD v. MACLAREN.

May 6.

MONTAGUE SMITH moved for leave to issue a scire facias to revive a judgment more than fifteen years old. The judgment had been entered up on a warrant of attorney, in Michaelmas Term 1821, and in 1823 two years' interest was paid. It appeared from the affidavits, that, in the year 1828, the defendant went to reside in America; but a letter from him, dated 17th October, 1842, was said to have been received by a person in Ireland on the 18th of November following. The defendant was the owner of some houses in Liverpool.

Practice as to service of a rule for scire facias to revive an old judgment.

PER CURIAM.—The proper course under the circumstances is to grant a rule to shew cause for next term: notice of the rule to be stuck up in the office, and to be served on the defendant's tenants in Liverpool.

Rule accordingly.

EAGLETON v. GUTTERIDGE.

May 6.

TRESPASS for breaking the outer door of and entering the plaintiff's dwelling-house, and doing damage therein,

In trespass for breaking the outer door, and entering the

plaintiff's dwelling house, and seizing his goods, the defendant may give in evidence, under a plea of not guilty by statute, that he had entered under a warrant of distress for rent, and was forcibly turned out of possession, and thereupon broke the door and entered, in order to seize the goods.

A power of attorney was executed abroad, appointing B. the attorney. It was delivered to Henry B., who, according to the evidence, was the party meant to be authorized by it; and he filled up the blank with his Christian name "Henry:"—*Held*, that the power was not invalidated thereby.

An agreement in the following terms:—"I, W. B., do hereby acknowledge that I am indebted to B., as agent of S., my landlord, in the sum of £22 for arrears of rent, for the cottage in my occupation; and I do now pay the said B. the sum of 5s. on account and in part of such rent, and do hereby undertake to pay the said B. the sum of £8 per annum, by quarterly payments from Michaelmas last;" was held not to require a lease stamp.

Esch. of Pleas, and expelling him therefrom, and seizing the plaintiff's goods being therein, &c.—Plea, not guilty by statute. At the trial before Lord *Denman*, C. J., at the last assizes at Hertford, the plaintiff having proved a forcible entry of his premises and seizure of his goods by the defendant, the following facts were proved on the part of the defendant.

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On the 9th of September, 1841, the plaintiff signed a paper in the following terms:—"I, William Eagleton, do hereby acknowledge that I am indebted to Mr. T. W. Blagg, as agent of John Sheppard, my landlord, in the sum of £22 for arrears of rent, for the cottage now in my occupation, and I do now pay to the said T. W. Blagg the sum of 5s. on account and in part of such rent, and do hereby undertake to pay to the said T. W. Blagg the sum of £8 per annum, for the said cottage and premises, by quarterly payments, from Michaelmas last." This document bore a £1 stamp, and was proved to have been executed during the minority of John Sheppard. It was objected for the plaintiff, that it operated as an actual demise, and therefore had not a sufficient stamp; and further, that Sheppard being a minor, had no power to appoint Blagg his agent for the receipt of rent, and therefore the agreement was void. These objections were overruled by the learned Judge.

It further appeared, that on the 27th of April, 1842, Sheppard, being then in America, executed a power of attorney, whereby he appointed "— Ree, of Ware," his attorney (*inter alia*) to ask, sue, demand, or distrain for, recover, and receive of and from all and every person and persons whom it might concern, all monies, &c. as should from time to time become payable for the rents &c. of the said premises, or otherwise in respect thereof, &c." Ree, who was an auctioneer at Ware, was examined as a witness, and proved that he had been applied to on the part of Sheppard to act as his agent, and on his consenting to

do so, the power of attorney, which was addressed "Mr. Ree, auctioneer, Ware," was delivered to him. Ree, or his son in his presence, being satisfied that the power was intended for him, there being no other auctioneer of that name in Ware, inserted his Christian name "Henry" in the blank left for that purpose in the power of attorney. The trespass in question was committed by the defendant in the execution of a warrant of distress signed by Ree, for the arrears of rent mentioned in the agreement before stated. The entry was effected without force in the first instance, but the defendant, having been forcibly ejected by the plaintiff, broke open the outer door of the house and again took possession, which was the trespass complained of.

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It was further objected on the part of the plaintiff, first, that the power of attorney was invalidated by the insertion in it of the Christian name of the attorney after its execution; 2ndly, that Ree could not delegate to the defendant his power to distrain; 3rdly, that the forcible entry of the defendant was not justifiable in law; and 4thly, that even if it was, such justification was not admissible under not guilty. The Lord Chief Justice, in summing up, told the jury, that if they were satisfied from the evidence that the defendant was forcibly turned out of possession, the subsequent re-entry was justifiable: and under his direction the jury found a verdict for the defendant, leave being reserved to the plaintiff to move to set it aside, and enter a verdict with 10*l.* 4*s.* 6*d.* damages.

Thesiger having obtained a rule accordingly,

Platt now shewed cause.—First, it is quite clear that no lease stamp was necessary in this case; the document given in evidence amounted merely to an acknowledgment of a pre-existing tenancy under Sheppard. [*Parke, B.*—There are no words in it importing a demise; neither is it signed

Exch. of Pleas, by Sheppard.] It was used merely as evidence of the defendant's admission of a previous demise, and of rent being due. Secondly, it was plain that the witness Ree was the person meant to be empowered by the power of attorney, and the putting in of his Christian name could not vitiate the instrument. Then the document signed by the plaintiff was sufficient evidence of a demise such as to warrant a distress, by the admission on the face of it that he was tenant to Sheppard at a rent certain. [*Alderson, B.*—It is clearly an acknowledgment of an antecedent tenancy, which authorized a distress.] With respect to the other objections, the jury having found that the defendant was forcibly turned out of the possession of the house, which he had taken lawfully, he was justified at common law in breaking the outer door to recover it.

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Peacock, contrà.—In order to warrant the distress, there must have been a demise at a rent certain; and unless the agreement was put in as a demise, there was no evidence of such a tenancy, nor did it appear when the arrears of rent accrued due: and if so, a lease stamp was necessary for it. As a mere acknowledgment, in 1831, of an antecedent tenancy, it was no evidence of such a tenancy as would authorize a distress in 1842. Besides, Sheppard was an infant at the time of its execution. [*Parke, B.*—An infant may demise. But this is not a demise; it is a mere acknowledgment of a bygone tenancy, and an agreement to go on upon the same terms, and was therefore properly stamped with an agreement stamp.] Secondly, the alteration of the power of attorney, after its execution, by the insertion of the Christian name of the attorney, was fatal to it: *Markham v. Gonaston (a)*. [*Parke, B.*—There was ample evidence that Henry Ree was the party whose name was intended to be put in, and a blank was left for

(a) Cro. Eliz. 626.

that purpose. If so, the insertion of the name does not avoid the deed, but only leaves a question as to the operation of the stamp laws ; and that objection was not taken.] Then, the evidence of justification was not properly admissible under the general issue. The subsequent entry by breaking the door was not an act which the defendant had a right to do under the original authority to distrain, and therefore he should have justified it specially. [*Parke, B.*—The defendant was justified in breaking the outer door, because he was forcibly turned out. He had a right to give in evidence, under the plea of not guilty by statute, everything which he might lawfully do in order to make the distress. The facts shew that he never was a trespasser.] The 11 Geo. 2, c. 19, s. 21, which gives the right of pleading the general issue, and giving the special matter in evidence, applies only to actions brought “relating to any entry by virtue of this act, or otherwise, upon the premises chargeable with such rents or services, or to any distress or seizure, &c. thereupon.” Here the defendant is not justifying under a mere entry in order to make the distress.

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PARKE, B.—Yes ; everything that was done was justifiable at common law under the entry to make the distress ; because circumstances existed here which entitled the defendant, for the purpose of the distress, to break open the outer door.

The rest of the Court concurred.

Rule discharged.

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May 8.

To an action for goods sold, the defendant pleaded *puis darrein continuance* that the plaintiffs had become bankrupts, and that afterwards an official assignee was appointed; and further, that after the last pleading in the cause, and within eight days now last past, the other assignees were duly chosen by the creditors:—*Held* bad, for not shewing that the official assignee was appointed after the last pleading, and within eight days before the plea.

DUNN and Another *v.* HILL.

ASSUMPSIT for goods sold and delivered, with a count upon an account stated.

Plea, dated 10th February, 1843, that the plaintiffs ought not further to maintain their action against the defendant, because he says, that the plaintiffs, before and on the 11th January, 1843, and from thence continually until the issuing of the fiat in bankruptcy hereinafter mentioned, were cornfactors and merchants, and dealers and chapmen, and exercised in copartnership the trade of cornfactors, &c., within the 6 Geo. 4, c. 16.—It then set out the petitioning creditor's debt, &c., and the issuing of a fiat in bankruptcy against the plaintiffs, under the 5 & 6 Vict. c. 122, on the 12th January, 1843, to be prosecuted in the Court of Bankruptcy in the Leeds district in the county of York; by virtue of which fiat Martin John West, Esq., one of the commissioners of the said Leeds District Court of Bankruptcy, on the 13th January, 1843, in due form of law found that the plaintiffs had become and were bankrupts before the issuing of the said fiat, within the true intent and meaning of the statutes concerning bankrupts, and did then adjudge the said plaintiffs to be bankrupts accordingly; and afterwards, to wit, on the same day and year last aforesaid, being the date of the said adjudication, the said M. J. West, so being such commissioner as aforesaid, duly made a memorandum of the said adjudication, and did afterwards, to wit, on the same day and year last aforesaid, at the Court of Bankruptcy for the said district then held at the Commercial Buildings at Leeds aforesaid, appoint Henry Philip Hope an official assignee, duly chosen and appointed according to the said statute, to be an assignee, &c. of the estate and effects of the said bankrupts, together with the assignees to be chosen by the creditors of the said bankrupts. The plea then, after setting out

the usual formal proceedings in bankruptcy, went on as follows: and the defendants further say, that after the last pleading in this cause, to wit, after the 23rd December, 1842, on which day issue was joined in this cause and notice of trial given, and before this day, and within eight days now last past, to wit, at a meeting duly held on the 2nd February, 1843, in the Court of Bankruptcy for the Leeds District aforesaid, at the Commercial Buildings at Leeds aforesaid, the said plaintiffs then remaining bankrupts, one Charles Barr and one John Wilson were nominated and chosen by the major part in value of the creditors of the plaintiffs who had, under the said fiat, proved their debts to be £10 and upwards, to be assignees of the estate and effects of the said plaintiffs; and afterwards, and after the last pleading in this cause on the 23rd December, 1842, on which day issue was joined in this cause, and notice of trial given, and before this day and within eight days now last past, to wit, on the said 2nd February, 1843, Montagu Baker Bere, Esq., then and still being one of the commissioners of the said Court of Bankruptcy for the said district, approved, ratified, and confirmed the said choice of and appointed the said Charles Barr and John Wilson assignees of the said estate and effects accordingly; and afterwards, and after the last pleading in this cause, and after the 23rd December, 1842, on which day issue was joined, &c., and before this day, and within eight days now last past, to wit, on the 2nd February, 1843, the said Charles Barr then accepted the said trust and appointment; by reason of which premises, and by force of the statute in such case made and provided, the said H. P. Hope and C. Barr then, and after the said alleged causes of action accrued, and after the last pleading in this cause on the 23rd day of December, 1842, on which day issue was joined in this cause and notice of trial given, and before this day, and within eight days now last past, to wit, on the 2nd day of February, became and were and are as-

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signees of the estate and effects of the plaintiffs as such bankrupts, and became and were entitled to the said alleged debts, sums of money, and causes of action in the declaration mentioned, and each and every of them.—Verification.

Special demurrer, assigning for causes, that the plea does not shew with sufficient or any certainty that the said Henry P. Hope was appointed to be an assignee as therein mentioned after the last pleading next before the same plea, or after the 23rd December, 1842, or after issue was joined in this cause, or after notice of trial given, or within eight days last past next before pleading the same plea, or that the matter of the said plea arose or accrued after the last pleading next before the said plea, or within eight days next before pleading the same plea.

Joinder in demurrer.

The plaintiffs' points were as follows:—

The plaintiffs contend that the passing away of the right of action mentioned in the declaration from themselves, which is the substance of the plea, does not appear with sufficient certainty to have taken place since the last pleading or continuance, and that such right passed away on the appointment of the said Henry Philip Hope as official assignee.

The defendant's were, that the defendant will insist that it was unnecessary to state that the official assignee was appointed after the last pleading.

Cowling, in support of the demurrer.—The object of this plea is to shew that the cause of action passed away from the plaintiffs after the last pleading, and within eight days before pleading it. It is the form of plea now (a) substituted for a plea puis darrein continuance. All such pleas require the greatest certainty, as being pleas in delay. *Com. Dig. "Abatement,"* (I. 24.) Now, although the plea states

(a) See Reg. Gen. H. 4 W. 4, r. 2.

that the plaintiffs became bankrupt, and that the creditors' assignees were chosen, after the last pleading, and within eight days before the plea, it does not state with certainty when the official assignee was appointed. He may have been appointed before issue joined, as well as more than eight days before the plea. The right of action clearly passed to him as soon as he was appointed, for an official assignee is to all intents and purposes an assignee of the bankrupt's estate and effects until the other assignees are chosen. Official assignees were first established by 1 & 2 Will. 4, c. 56, s. 22, which provides, that "until assignees shall be chosen by the creditors of each bankrupt, such official assignee shall be enabled to act, and shall be deemed to be, to all intents and purposes whatsoever, a sole assignee of each bankrupt's estate and effects." And there is a similar provision in the 48th section of the subsequent statute of 5 & 6 Vict. c. 122, under which this fiat was issued. So, in Montagu & Ayrton's Bankrupt Law, p. 114, it is said, "The official assignee acts as provisional assignee." And in page 226 of the same book, "Until the assignees are chosen, the official assignee is, to all intents and purposes, sole assignee." And in *Munk v. Clark (a)*, *Bosanquet, J.*, states the liabilities of an official assignee to be "the same as those of an ordinary assignee."

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Addison, contra.—The plea is sufficient. It shews substantially all that it was necessary to shew, viz. that since the last pleading, and within eight days next before the plea, the plaintiffs' right of action vested in their assignees. Suppose the official assignee had died two days after his appointment, and that, within eight days next before plea, the creditors' assignees had been appointed, would not the plea be good? The Rule of Hilary Term, 4 Will. 4, r. 2, which compels parties to plead *pleas puis darrein continuance* within

(a) 2 Bing. N. C. 309; 2 Scott, 475.

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eight days after the subject-matter arose, would be productive of great hardship if strictly construed, as it would be often difficult within that time to ascertain the precise state of facts. Pleas puis darrein continuance being pleadable as of right, as was held in *Kinnear v. Tarrant* (a), ought not to be so confined. Assuming it to have been the intention of the stat. 5 & 6 Vict. c. 122, s. 48, to enable the official assignee to sue for those rights of action which were before vested in the bankrupts, still it is not compulsory on him to do so, and in practice he never sues alone; and the only object of his appointment seems to be to preserve the property of the bankrupt for the benefit of the creditors, until the other assignees are appointed. This plea shews distinctly that the other assignees were not appointed until within eight days before the plea pleaded, and it is submitted, therefore, that it shews a cause of action arising within the eight days.

Lord ABINGER, C. B.—This plea is bad. A plea puis darrein continuance ought to be certain, for by pleading it the defendant abandons all other defences, and rests upon that alone. Now, this plea professes to shew that, subsequently to the last plea, and within eight days next before pleading it, the plaintiffs' right of action was divested out of them, and transferred to some one else; but it does not appear on the face of this plea when the transfer to the official assignee took place; at all events, it is not shewn with the certainty required in such pleas, that it occurred subsequently to the last pleading. It is clear on the words of the stat. 5 & 6 Vict. c. 122, s. 48, which have been referred to, that the official assignee of a bankrupt has vested in him all the rights and interests of the bankrupt until the other assignees are appointed. This certainly might be doubtful if the question rested on the first part of the clause; for it is very singular that that part only says that the official

(a) 15 East, 622.

assignee alone shall possess and receive all the estate and effects of the bankrupt; but the subsequent part clearly shews that, until the appointment of the creditors' assignees, all their interest vests in the official assignee, and that he is to all intents and purposes a provisional assignee. A transfer to him, therefore, divests the property out of the bankrupts, and as the plea in the present case leaves it quite uncertain when that transfer took place, it is bad. As to the argument urged, that requiring strictness in pleas of this nature would be productive of hardship, the answer is, that the rule which requires the party pleading such a plea to make affidavit that the subject-matter of it arose within the preceding eight days, expressly reserves power to the Court or a Judge to allow further time, which the defendant, if he wants it, should apply for.

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PARKE, B.—I also think the plea is clearly bad. It does not shew that the appointment of the official assignee took place after the last pleading.

ALDERSON, B., and GURNEY, B., concurred.

Judgment for the plaintiffs.

SMITH v. Cox.

May 8.

ASSUMPSIT by the indorsee against the drawer of a bill of exchange. The declaration stated, that whereas the defendant, on the 28th of August, 1842, made his bill of exchange in writing, and delivered the same to one W. Silk, jun., and thereby required the said W. Silk, jun., to pay to the order of the defendant £20, three months after the date thereof, which period had elapsed before the commencement of the suit; and the defendant then de-

In assumpsit by the indorsee against the drawer of a bill of exchange, it is necessary to allege a promise to pay, and without such allegation the count is bad on special demurrer.

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livered the said bill to the said W. Silk, and the said W. Silk then accepted the said bill, and the defendant then indorsed the same to one Justinian Adcock, who then indorsed the same to the plaintiff; and the said W. Silk did not pay the said bill, although the same was duly presented to him on the day on which it became due, of which the defendant then had due notice. There was also a count on an account stated.

Special demurrer to the first count, assigning the following causes:—That the said first count does not state, allege, or contain any promise by the defendant to pay the said bill of exchange, or any promise by the defendant to pay the sum of money in that count mentioned; and that it is not in or by the said count stated or shewn, that the defendant promised to pay the said sum of money in the said count mentioned.

Whitehurst, in support of the demurrer, was stopped by the Court, who called upon

Hugh Hill to support the declaration.—It was not necessary to allege an express promise, as the law will imply a promise to pay from the facts stated: and the promise being only a conclusion of law, it could not be traversed. In *Griffith v. Roxburgh* (a), *Alderson*, B., seemed to be of opinion, though the point was not there determined, that since the new rules have rendered the plea of non assumpsit inadmissible in actions on bills of exchange, it is unnecessary to allege a promise to pay, which it is not competent to the defendant to deny. It might be otherwise in an action at the suit of an executor, for in that case the promise may be put in issue: *Timmis v. Platt* (b). It is not necessary to allege matters of law, which the Court are bound to take notice of. Although it is usual to state a

(a) 2 M. & W. 738.

(b) *Id.* 720.

promise in indebitatus assumpsit, it is not necessary to do so, it being a conclusion of law.

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PER CURIAM (a).—Unless a promise be alleged in declarations on bills of exchange, there will be nothing to distinguish the action of assumpsit from that of debt, and from aught that appears here, there being no promise alleged, there might be a misjoinder of counts on the record. It was not the intention of the new rules to fritter away all distinction between the different forms of action. The plaintiff may have liberty to amend, otherwise there will be judgment for the defendant.

Leave to amend accordingly.

(a) Lord Abinger, C. B., Parke, B., Alderson, B., and Gurney, B.

PEARSON v. ARCHBOLD.

May 8.

THIS was an action of assumpsit, to which the defendant pleaded three pleas: first, non assumpsit; secondly, payment; and thirdly, a set-off. After issue joined, and before the trial, the cause and all matters in difference were referred by a Judge's order, which directed that the costs of the cause should abide the event of the award, and that the costs of the reference and award should be in the discretion of the arbitrator. The arbitrator awarded, "that the plaintiff do pay to the defendant, on the 14th of September next, the sum of £16 10s. 2d., being the balance

In an action of assumpsit, the defendant pleaded non assumpsit, payment, and a set-off; and issues having been joined thereon, the cause and all matters in difference were, by a Judge's order, referred to arbitration, the costs of the cause to abide the event, and

the costs of the reference and award to be at the discretion of the arbitrator. The arbitrator awarded "that the plaintiff should pay to the defendant the sum of 16l. 10s. 2d., being the balance which I find to be due from the plaintiff to the defendant;" and he further awarded that each party should pay his own costs of the reference, and a moiety of the costs of the award:—*Held*, that the award was bad, on the ground of uncertainty as to the finding of the issues, and there being no adjudication at all upon the cause.

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which I find to be due from the said plaintiff to the said defendant." He further awarded that each of the parties should bear his own costs of the reference, and a moiety of the costs of the award. The plaintiff not having paid the amount awarded and the costs, the defendant obtained a rule nisi for an attachment for non-payment of the sum awarded and costs, against which rule

Crompton now shewed cause.—The award is bad, for it does not dispose of the cause, and does not determine the event on which the costs of it were to depend. There is also no distinct finding upon the several issues, as there ought to have been: it is consistent with this finding that the plaintiff may have succeeded on one, or upon two, or upon neither of the issues. The case of *Bourke v. Lloyd* (a) is precisely in point. In that case, where there were several issues, the costs of the cause were to abide the event of the award. The arbitrator awarded that the plaintiff had good cause of action against the defendant, and directed that the defendant should pay to the plaintiff £20, together with the costs of the action and of the reference, but he did not award specifically on each issue; and it was held that the award was bad, on the ground that the arbitrator was bound to award specifically on each issue, otherwise there is no event upon which the Master can tax the costs. The award is therefore bad. The plaintiff did not move to set it aside, as he thought the defendant would never seek to enforce it.

Sir *John Bayley*, contra.—The award is sufficient. In *Cooper v. Langdon* (b), where there were seven issues, and the arbitrator awarded that the verdict entered for the plaintiff should be set aside, and a verdict entered for the defendant, the award was held good. [*Parke*, B.—In that

(a) 10 M. & W. 550.

(b) 9 M. & W. 60.

case the Court decided that all the issues were found for the defendant.] *Esch. of Pleas, 1843.*

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LORD ABINGER, C. B.—I think this rule ought to be discharged. We cannot tell how the arbitrator intended to dispose of the cause, for he has not decided upon it at all. It is consistent with this finding, that the plaintiff may have succeeded on one of the issues, and the defendant on the others; or that the arbitrator may have found all the issues in favour of the plaintiff, and may have awarded the money to be paid to the defendant in respect of the matters in difference.

PARKE, B.—I am of the same opinion. It is impossible to say on this award what issues are found for the plaintiff and what for the defendant, or which way the verdict is found. It is consistent with this finding that the arbitrator may have awarded the sum of £16 10s. 2d. to be paid to the defendant on account of his set-off exceeding pro tanto the amount of the plaintiff's claim, and the plaintiff may have succeeded on the other issues. In *Cooper v. Langdon*, the question was whether the defendant could consistently have a verdict on all the issues; it was held that he could, and that there would be no error on the record.

ALDERSON, B., and GURNEY, B., concurred.

Rule discharged.

Exch. of Pleas,
1843.

May 8.

Covenant.

The declaration stated, that by indenture the plaintiff demised a dwelling-house and premises to the defendant, and the defendant thereby covenanted that he would expend £100 in substantial improvements of and additions to the dwelling-house, under the direction and with the approbation of some competent surveyor, to be named by and on the part of the plaintiff. Breach, that the defendant did not expend £100 on substantial improvements and additions to the said dwelling-house, under the direction or with the approbation of a competent surveyor, to be named by and on the part of the plaintiff, but neglected and refused so to do, although the plaintiff was always ready and willing to appoint a competent surveyor to approve of such substantial improvements and additions:—*Held*, that the breach was bad, for that the appointment of a surveyor was a condition precedent to the defendant's liability to expend the £100.

COOMBE v. GREENE.

COVENANT.—The declaration stated, that theretofore, to wit, on the 23rd of April, 1832, by a certain indenture then made between the plaintiff of the one part, and the defendant of the other part (profert), the plaintiff, for the considerations therein mentioned, did demise, &c. to the defendant, his executors, &c. all that messuage or tenement, with the barn, stable, and buildings, and several closes of land, &c. therein described, for the term of ten years, at the rent of £100, by four quarterly payments. And the defendant did, for himself, his heirs, executors, &c. thereby covenant with the plaintiff, her heirs, executors, &c. that he the defendant, his executors, &c. should and would lay out and expend the sum of £100, being equivalent to the first year's rent for the said demised premises, in substantial and beneficial improvements of and additions to the said messuage or dwelling-house, and in the substantial and permanent repairs thereof, under the direction or with the approbation of some competent surveyor, to be named by and on the part of the said plaintiff, her heirs and assigns. The lease also contained a general covenant to repair, which was set out. Breach, that the defendant did not nor would, after the making of the said indenture and during the continuance of the said demise, or at any other time, lay out and expend the sum of £100, or any part thereof, in substantial and beneficial improvements of and additions to the messuage or dwelling-house, or in the substantial and permanent repairs thereof, under the direction or with the approbation of a competent surveyor, to be named by and on the part of the said plaintiff, her heirs or assigns, or otherwise according to the covenant in that behalf, but on the contrary thereof, the defendant,

after the making of the said indenture and during the continuance of the said demise during the said term, and since wholly neglected and refused so to do, although the said plaintiff always during the said term was ready and willing to appoint a competent surveyor to approve of such substantial and beneficial improvements of and additions to the said messuage, of which the said defendant during all that time had due notice.

Exch. of Pleas,
1843.

COOMBE
v.
GREENE.

Special demurrer, assigning for causes, inter alia, that it is not alleged in the said count that the plaintiff has ever named a competent or any surveyor, under whose direction or approbation the defendant might or could have laid out and expended the said sum of money in repairing the said premises according to the said covenant; that it is not alleged or shewn that the plaintiff was ready and willing to name a surveyor according to the said covenant; that it is not alleged that the plaintiff ever offered to name a surveyor, to direct or approve of the laying out and expenditure of the said money by the defendant, &c.

Joinder in demurrer.

The defendant's points marked for argument were as follows :—

The defendant will contend that the breach is bad, because, inasmuch as the improvements of and additions to the messuage mentioned in the declaration were to be done under the direction of a surveyor to be named by the plaintiff, the naming of the surveyor by the plaintiff was a condition precedent to the performance of the covenant on the part of the defendant, and that the said first breach is bad for not averring performance, or some dispensation of performance, by the plaintiff of such condition precedent. That if the naming of a surveyor by the plaintiff was not a condition precedent to the defendant's performance of the covenant, still, if any improvements or additions were made by the defendant, the naming of a surveyor by the plaintiff, and the disapproval of such improvements or ad-

Exch. of Pleas,
1843.

COOMBE
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ditions by such surveyor, were conditions precedent to any right of action in the plaintiff on the said covenant ; and on the other hand, if no improvements or additions whatever were made, the said first breach is too large, uncertain, and ambiguous.

The plaintiff's points for argument were:—The plaintiff will contend that the naming of a surveyor by the plaintiff was not a condition precedent, and that it was not necessary to aver performance or dispensation of performance by the plaintiff of the said supposed condition precedent, but that the breach assigned is good in all respects, and not open to the objections, or any of them, set forth in the demurrer and points for argument made by the defendant.

Bovill, in support of the demurrer.—The objection is, that the declaration does not shew that any surveyor was appointed, and until a surveyor was appointed there could be no breach on the part of the defendant. The money was to be laid out under the direction of a surveyor to be appointed by the plaintiff, which was a condition precedent, and until he was so appointed, the covenant could not be performed by the defendant. And it is not enough to aver a readiness and willingness to appoint a surveyor, because the defendant had nothing to do with the appointment : it ought to have been shewn distinctly that an appointment had been made. As it is, the declaration does not shew that the defendant has broken his covenant.

Ogle, contra.—The general covenant to repair is not controlled by the appointment of a surveyor, and there might be circumstances under which the plaintiff might be entitled to maintain an action, although a surveyor had not been appointed. Suppose the defendant had wilfully damaged or pulled down any part of the dwelling-house, could not the landlord have maintained an action for

dilapidations, without a surveyor having been appointed? *Exch. of Pleas, 1843.*
 In such a case the tenant would be bound to rebuild it, and in the event of his neglecting to do so, he would be liable to an action on the covenant. *COOMBE v. GREENE.*

PER CURIAM.—The plaintiff has declared on a covenant by which the defendant undertook to expend the sum of £100 in substantial improvements of and additions to the dwelling-house, and in the substantial repair thereof, under the direction and with the approbation of a surveyor. Now the appointment of a surveyor was a preliminary step, for until one was appointed he could not give directions as to how the money was to be expended. The defendant could not fulfil his part of the contract, without the approbation of a surveyor, who was to direct and approve of his proceedings. The appointment of a surveyor is therefore a condition precedent to his liability to expend the £100: and as the declaration does not aver any such appointment to have taken place, it is bad, and there must be

Judgment for the defendant.

BARTLETT v. SMITH.

May 10.

ASSUMPSIT by the indorsee against the drawer of a bill of exchange. The declaration stated, that the defendants, on &c., made their certain bill of exchange in writing, and directed the same to Mr. John E. Butcher, Dublin, and thereby required the said J. E. Butcher to pay to the order of the defendants, in London, the sum of £17. It then alleged the indorsement of the bill to the plaintiffs.

Where the admissibility of a bill of exchange, purporting to be a foreign bill, and stamped accordingly, was objected to on the ground that, though it purported to be drawn abroad,

it was in fact an inland bill, drawn in London, and evidence was offered to prove that fact:—*Held*, that the Judge ought to have received the evidence in that stage of the cause, and decided upon the admissibility of the instrument, and not to have received the evidence afterwards, as part of the defendant's case, and submitted it to the jury.

Exch. of Pleas,
1843.

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v.
SMITH.

The defendant, by his pleas, denied the drawing and indorsement.

At the trial before the undersheriff of Middlesex, the bill, when produced, appeared to be drawn in Dublin, payable in London, and was stamped as a foreign bill. On the plaintiff's counsel proposing to read it in evidence, the defendant's counsel objected, on the ground that, although the bill purported to be drawn in Dublin, it was in fact drawn in London, and being therefore an inland bill, required a higher stamp; and proposed to give evidence of that fact. The undersheriff however said, that as the bill was not objectionable on the face of it, he should allow the case to proceed; on which the defendant's counsel addressed the jury, and afterwards adduced evidence to shew that at the time the bill bore date, the drawer was in London: whereupon the undersheriff left it to the jury to say whether the bill was drawn in London or Dublin, but reserved leave to the defendants to move to enter a nonsuit, if this Court should think he ought to have received the evidence in the first instance, and to have decided upon it. The jury having found a verdict for the plaintiff,

R. V. Richards, on a former day in this Term, obtained a rule for a nonsuit accordingly.

Crowder and Hughes shewed cause.—The evidence tendered was insufficient. In *Abraham v. Dubois* (a), it was held by Lord *Ellenborough*, that in order to prove that a bill of exchange purporting to be drawn abroad was in fact drawn in England, it is not sufficient barely to shew that the drawer was in England at the time it bore date. Undoubtedly, in *Birè v. Moreau* (b), it appears to have been held by *Best*, C. J., that if it appear from the evidence that the drawer was in England on the day on which the bill purported to be drawn, the defendant will be entitled to a

(a) 4 Camp. 269.

(b) 2 C. & P. 376.

verdict. But there the question was left to the jury. *Exch. of Pleas, 1843.*
 [Alderson, B.—That is leaving to the jury the question whether the document is or is not admissible in evidence. BARTLETT
 Parke, B.—The undersheriff surely must decide for himself whether the evidence is or is not admissible.] v. SMITH.]

R. V. Richards and Meteyard, contra.—The undersheriff ought to have received the evidence for the purpose of satisfying his own mind as to when the bill was drawn, and deciding upon its admissibility, and not to have left the case to the jury.

LORD ABINGER, C. B.—I am of opinion that this rule must be made absolute for a new trial, but not to enter a nonsuit. All questions respecting the admissibility of evidence are to be determined by the judge, who ought to receive that evidence, and decide upon it without any reference to the jury. In all cases where an objection is made to the competency of witnesses, any evidence to shew their incompetency must be received by the judge, and adjudicated on by him alone. So, in the present case, evidence offered to impeach the admissibility of the bill, on the ground that it was improperly stamped, should have been received by the judge, and determined by him before the bill was allowed to be read to the jury. When the objection was made that the bill bore a wrong stamp, the undersheriff ought to have received the evidence to impeach it, before he allowed the bill to be read; and it was for him to say whether the evidence adduced for the purpose was such as to satisfy him or not. The evidence tendered was for the purpose of shewing that the bill ought not to be read at all; and if the undersheriff rejected it in the first instance, he ought not to have received it afterwards and submitted it to the jury. There ought, therefore, to be a new trial.

PARKE, B.—I am of the same opinion. All preliminary
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matters of this kind are to be determined by the judge, not by the jury. I well recollect the case of Major Campbell, who was indicted for murder in Ireland; and on a dying declaration being tendered in evidence, the judge left it to the jury to say whether the deceased knew, when he made it, that he was at the point of death. The question as to the propriety of the course adopted in that case was sent over for the opinion of the English judges, who returned for answer that the course taken was not the right one, and that the judge ought to have decided the question himself. There was also a case before myself at York, where a witness was objected to by a prisoner as incompetent, and the question arose as to the course to be adopted under such circumstances: I took the opinion of all the judges upon it, who held that I ought to have received all the evidence advanced, both to impeach the competency of the witness, and in support of it, before I allowed him to give any evidence to the jury. In like manner, it is for the judge to say whether an instrument which is proposed to be given in evidence is properly stamped or not, and to decide upon the evidence respecting its admissibility.

ALDERSON, B.—I am of the same opinion. Where a question arises as to the admissibility of evidence, the facts upon which its admissibility depends are to be determined by the judge, and not by the jury. If the opposite course were adopted, it would be equivalent to leaving it to the jury to say whether a particular thing were evidence or not. It might as well be contended that a judge ought to leave to the jury the question, whether sufficient search had been made for a document so as to admit secondary evidence of its contents.

ROLFE, B., concurred.

Rule absolute for a new trial.

Exch. of Pleas,
1843.

THOMSON, Public Officer of The Forth Marine Insurance
Company, v. REDMAN.

May 11.

IN this case interlocutory judgment had been signed, on the ground that the defendant, being under terms of pleading issuably, had pleaded a plea which was not issuable. The action was in indebitatus assumpsit for premiums of insurance, money paid, and for money found to be due on an account stated; to which the defendant pleaded, first, non assumpsit; secondly, a set-off, stating that the said company in the declaration mentioned were indebted to the defendant in the sum of £1500, upon a certain policy of insurance made by the said company, lost or not lost, from London to Sierra Leone, on a certain ship called the Lord Wellington, and the said assurance was thereby declared to be for £1500 upon freight: the plea then averred a total loss, and that the defendant was ready and willing out of the said sum of £1500 to set off and allow to the said company the said damage and cause of action.

Martin having obtained a rule to shew cause why the interlocutory judgment should not be set aside for irregularity,

Rawlinson shewed cause.—The defendant's demand against the plaintiff, being for a loss upon a policy of insurance, is a claim for unliquidated damages, which is not the subject of set-off, and therefore the plea is not an issuable one, and judgment was properly signed as for want of a plea. The statutes of set-off are confined to mutual debts between the plaintiff and defendant. But until the damages are ascertained by the verdict of a jury, the extent of the liability of the company upon the policy is altogether uncertain, and cannot be considered as a debt within the meaning of the statutes. In the case of *Howlet*

Where, in assumpsit for premiums of insurance, monies paid, and money due on an account stated, the defendant, being under terms of pleading issuably, pleaded as a set-off, that the plaintiffs were indebted to him in the sum of £1500 for a total loss on a policy of assurance for freight; and the plaintiff signed interlocutory judgment, on the ground that the plea was not issuable; the Court set aside the judgment without costs, in order that the question as to the sufficiency of the plea might be argued on demurrer.

Quere, whether unliquidated losses on a policy of assurance can be made the subject of set-off:—*Semble*, that they cannot.

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v. Strickland (a), the defendant pleaded to an action of covenant, that he had sustained greater damages by reason of the breaches committed on the part of the plaintiff, than the value of the damages sustained by the plaintiff on account of the breaches in the declaration. All the breaches alleged in the plea were for non-delivery of alum in due time. The defendant demurred specially, on the ground that it was not competent to the defendant to plead these damages by way of set-off; and Lord *Mansfield*, C. J., said, "The act of Parliament and the reason of the thing relate to mutual debts only. These damages are no debts. An indebitatus assumpsit could not be brought for them." And *Ashurst*, J., says, "Debts, to be set-off, must be such as an indebitatus assumpsit will lie for:" to which *Aston*, J., adds, "Clearly an unliquidated demand or uncertain damages cannot be set off." And in *Cope v. Joseph* (b), the Court, with reference to actions on policies of insurance, said, "In such actions undoubtedly the demand is for unliquidated damages." The true test is that applied by *Tindal*, C. J., in *Morley v. Inglis* (c), which is conclusive against this set-off. He says: "It seems to me, that the rule by which we are to determine whether or not a demand can become the subject of a set-off, is by inquiring whether it sounds in damages: whether the demand is capable of being liquidated, or ascertained with precision at the time of pleading." In *Grant v. The Royal Exchange Assurance Company* (d), where the claim was for a total loss on a policy of insurance, both Lord *Ellenborough*, C. J., and *Bayley*, J., state that, the claim being for unliquidated damages, a set-off could not be allowed. Here the policy does not appear by the plea to have been adjusted; and therefore the amount to be recovered is quite uncertain. It may be 1s., or £1500 or any less sum. The decisions in cases of bankruptcy do not bear upon this question, for

(a) Cowp. 56.

(b) 9 Price, 159.

(c) 4 Bing. N. C. 58; 5 Scott, 314.

(d) 5 M. & Selw. 439.

the statutes relating to bankrupts apply to mutual credits as well as debts. Secondly, the plea not being an issuable one, it rendered the whole a nullity, and the plaintiff was entitled to sign judgment.—He cited *Humphreys v. The Earl of Waldegrave* (a), *Parratt v. Goddard* (b), *Wettenhall v. Graham* (c), and *Blackburn v. Edwards* (d).

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Martin, in support of the rule.—This is not a question whether the plea is a good or bad plea on demurrer, but whether it is such a plea as is proper to be pleaded when the defendant is under terms of pleading issuably. The plea states a valued policy, and there is therefore an original liability on the policy. There appears to be no distinction between a claim for a loss on an insurance of freight, and a claim in indebitatus assumpsit for goods sold and delivered; in either case the amount of the claim must be ascertained by the verdict of the jury: in the one case they would have to find the value of the goods, and in the other the value of the freight. But it is clear that a claim on a sale of goods, without the price being ascertained and fixed, is the subject-matter of a set-off. Many demands, for which debt will not lie, may be made the subject-matter of set-off. *Morley v. Inglis* is not applicable, for there the claim sought to be set off arose upon a guarantee; and a guarantee is not a debt. The case of *Grant v. The Royal Exchange Assurance Company* is not in point. That case was decided on the grounds that, the plaintiff's claim being unliquidated, the defendants could not reduce it according to their own estimate, which they could not oblige the plaintiff to abide by, and also that, as the policy embraced several interests, there was no mutuality between it and the obligation made to the defendants. The present question has never been distinctly decided;

(a) 6 M. & W. 622.

603.

(b) 9 M. & W. 458.

(d) 10 Ad. & Ell. 21; 2 Per.

(c) 4 Bing. N. C. 714; 6 Scott, & D. 237.

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but there is no reason why the defendant should not be allowed to set off that the plaintiffs are indebted to him in a greater amount on the policy, than he is indebted to them for premiums and for money paid.

LORD ABINGER, C. B.—My opinion is against the plea; yet, as there is some doubt about it, the question had better, perhaps, be put upon the record and argued on demurrer. The rule must therefore be absolute to set aside the judgment, but without costs.

PARKE, B.—In *Cumming v. Forester* (a), it appears to have been thought that, in an action by the underwriter against the assured for premiums, the latter could not set off unliquidated losses happening upon policies: but that is only a dictum; as the case was decided on another ground. *Koster v. Eason* (b) affords a semblance of authority in support of the defendant's position. It was there held that the defendants, who were insurance brokers, might, in an action brought against them by the assignees of an underwriter who had become bankrupt, for premiums, set off losses and returns on policies effected in the name of their own firm; such losses and returns having become due on those policies before the time when the bankrupt stopped payment, though they had not been adjusted by the bankrupt, but only by the other underwriters, between the time of his stopping payment and committing the act of bankruptcy, on which adjustment the defendants had given their principals credit for the amount.

ALDERSON, B.—I agree that under the circumstances the rule ought to be made absolute, although I have some difficulty in seeing how the defendant's claim, which is altogether uncertain, can be made the subject of a set-off.

ROLFE, B., concurred.

Rule absolute.

(a) 1 M. & Selw. 494.

(b) 2 M. & Selw. 112.

Esch. of Pleas,
1843.

QUARRINGTON v. ARTHUR (a).

May 11.

IN this case *Petersdorff* shewed cause against a rule obtained by *E. V. Williams*, for judgment as in case of a nonsuit. The action was in covenant, and there were several breaches alleged in the declaration, to which there were separate pleas. Some of these were demurred to, and on the others issues of fact were joined. The demurrers were argued, and judgment given for the defendant. The plaintiff not having proceeded to the trial of the issues of fact, the present rule was obtained. It appeared by the plaintiff's affidavit, that since the issues were joined the defendant had become bankrupt, and *Petersdorff*, on behalf of the plaintiff, offered a *stet processus*. It was contended on behalf of the defendant, that, inasmuch as his right to the costs of the demurrer had already accrued, the *stet processus* should only extend to the issues of fact, leaving the defendant to recover his costs of the demurrers. And

Where, in an action of covenant, several breaches were alleged in the declaration, to which there were separate pleas, some of which were demurred to, and on the others issues of fact were joined; and judgment having been given for the defendant on the demurrers, the plaintiff did not proceed to trial with the issues in fact, whereupon the defendant obtained a rule for judgment as in case of a nonsuit: but the defendant having become bankrupt since the issues were joined, a *stet processus* was offered by the plaintiff; it was *held*, that, inasmuch as the defendant's right to the costs of the demurrer had already accrued,

PARKE, B., was of this opinion; but as there might be a difficulty in point of form in entering a *stet processus* to only a part of the record, it was agreed that, as to those parts of the declaration to which the issues of fact extended, the plaintiff should enter a *nolle prosequi*, the defendant consenting that the plaintiff should be liable to no costs on such *nolle prosequi*.

Rule accordingly.

the *stet processus* could only extend to the issues of fact, leaving the defendant to recover his costs of the demurrer. There being, however, a difficulty as to entering a *stet processus* to a part of the record, it was agreed that the plaintiff should enter a *nolle prosequi* as to such parts of the declaration as related to the issues of fact, the defendant consenting that the plaintiff should not be liable to costs on the *nolle prosequi*.

(a) This case occurred before *Parke, B.*, sitting alone.

Exch. of Pleas,
1843.

April 19.

Where the defendant, being a creditor of the plaintiff, entered into a composition deed, with the other creditors, to receive 10s. in the pound, under an agreement with the plaintiff that he would give the defendant his promissory note for the remainder of the debt, which the defendant should keep in his own hands; and the note was accordingly given, and the composition paid to the defendant; and he negotiated the promissory note, the holder of which enforced payment from the plaintiff:—*Held*, that the plaintiff might recover back from the defendant the sum so paid by him in an action for money paid.

HORTON v. RILEY.

ASSUMPSIT for money paid, and on an account stated. Pleas, non assumpsit, and a set-off. At the trial before *Alderson, B.*, at the last Warwick Assizes, it appeared that the plaintiff had entered into a composition, by deed, with his creditors, of whom the defendant was one, to pay them a composition of 10s. in the pound upon their respective debts, by instalments to be secured by bills of exchange at three, six, and nine months. The defendant signed the composition deed, and received the composition, upon a private stipulation with the plaintiff, that the excess of his debt beyond the composition should be secured to him by the joint promissory note of the plaintiff and two sureties, which the defendant agreed that he would keep in his own hands. The note was accordingly given, but was negotiated by the defendant, and was paid by the plaintiff to the holder on its becoming due: and the present action was brought to recover back from the defendant the sum of £384, the amount so paid by the plaintiff in satisfaction of the note. It was contended for the defendant, that the action could not be maintained, and that the authority of the case of *Smith v. Cuff (a)*, which was referred to on behalf of the plaintiff, had been questioned in later cases. The learned Judge reserved the point, and a verdict was found for the plaintiff, damages £384, leave being reserved to the defendant to move to enter a verdict for him on the first issue.

Humfrey now moved accordingly.—If the case of *Smith v. Cuff (a)* be sustained, it is no doubt an authority for the plaintiff: but after the doubts expressed in *Bradshaw v.*

(a) 6 M. & Sel. 160.

Bradshaw (a) and *Wilson v. Ray* (b), it can hardly be considered a binding authority. Lord *Ellenborough* puts the case as not being a case of *par delictum*, but of oppression on the one side and submission on the other. But surely it is no more a case of oppression than where a man goes to discount a bill, and submits to the terms imposed upon him as the price of it. When the debtor has bought his bargain with the creditor, he ought to pay the price of it. Besides, the plaintiff cannot recover except by means of the illegal contract, to which he was himself a party, in fraud of the other creditors. *Collins v. Blantern* (c). [*Parke, B.*—It is like the case of a creditor of a bankrupt who receives money to sign his certificate; there the latter may recover it back, yet both are violating the law.] If the plaintiff had paid money directly to the defendant, he clearly could not have recovered it back, according to *Wilson v. Ray*. *Turner v. Hoole* (d) must be considered to have been overruled by that case. [*Alderson, B.*—Here there was an express agreement that the note should remain in the defendant's hands. This was a payment which was not only involuntary, but also contrary to the agreement of the parties.] It can hardly be said that the law raises an implied contract whereby this becomes a payment to the use of the defendant, when, in order to prove it, the plaintiff is compelled to shew an illegal contract, against the policy of the law.

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LORD ABINGER, C. B.—The agreement in this case makes it even stronger than *Smith v. Cuff*, which is expressly in point. I see no reason why we should depart from that decision.

PARKE, B.—These facts would have formed a good de-

(a) 9 M. & W. 29.

(c) 2 Wils. 341.

(b) 10 Ad. & E. 82; 2 P. &
D. 253.

(d) Dowl. & Ry. N. P. C. 27.

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fence to an action by the defendant upon the note against the plaintiff. Then the defendant hands the note over to a third party, and so prevents the plaintiff from availing himself of that defence. The plaintiff is thereby compelled to pay the money, contrary to the agreement of the parties, and he has a right to recover it back from the defendant.

ALDERSON, B., and ROLFE, B., concurred.

Rule refused.



OGDEN and Another, Assignees of —, an Insolvent Debtor, v. STONE.

April 28.

Where a trader, being in insolvent circumstances, makes a voluntary payment to a creditor, contemplating at the time, either the taking the benefit of the Insolvent Act, or his being made a bankrupt; if he afterwards petitions for relief under the Insolvent Act, the assignees under his insolvency may recover back the money so paid; so, if he afterwards become bankrupt, the assignees in bankruptcy may recover it back.

ASSUMPSIT for money had and received by the defendant to the use of the insolvent before his insolvency, for money had and received to the use of the plaintiffs as assignees, and on an account stated with them as assignees. Plea, non assumpsit.

At the trial before *Coltman, J.*, at the last Liverpool Assizes, it appeared that the defendant was the trustee under the insolvent's marriage settlement, which was executed in November, 1840, and by which the sum of £800 was settled to the use of the wife for life, with remainder to the husband during his life *or solvency*; with a provision that, upon his insolvency or bankruptcy, the interest should accumulate, and upon his death the whole fund should be divided amongst the children of the marriage. The deed contained a power to the wife, by writing under her hand, to authorize and direct the trustee to lend the money to the husband on sufficient security. In March 1841, she gave the defendant an authority accordingly, and the £800 was thereupon advanced by the defendant to the insolvent, on the security of his warrant of attorney. On the 30th October 1841, the latter petitioned the Insolvent Debtors'

Court for his discharge under the act, and on the 30th May, 1842, went to prison. Upon his insolvency occurring, it was discovered that the warrant of attorney had not been filed in due time, as required by the 3 Geo. 4, c. 39, so that it became void upon his insolvency. The defendant thereupon made application to him for the repayment of the money; and on the 21st and 25th of October, 1841, the insolvent made payments, amounting to the sum of £872, in discharge of the principal sum of £800, of interest since the advance to him, and of the bill of costs of the attorney who prepared the warrant of attorney; and this action was brought by the assignees to recover back that sum, on the ground that these were payments made by the insolvent voluntarily, and with the view and intention of taking the benefit of the Insolvent Debtors' Act, and so fraudulent and void within the stat. 1 & 2 Vict. c. 110, s. 59 (a). There was evidence to shew, that, at the time when the insolvent filed his petition, certain of his creditors had threatened to take out a fiat in bankruptcy against him, and also that negotiations had been on foot for a distribution of his remaining effects for the benefit of his creditors, upon their giving him a release. The learned Judge, in summing up, left it to the jury to say whether

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(a) Which enacts, "that if any prisoner shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed and is hereby

declared fraudulent and void, as against the provisional or other assignee or assignees of such prisoner appointed under this act; provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void, unless made within three months from the commencement of such imprisonment, or with the view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his discharge from custody under this act."

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the payments were made by the insolvent, when in insolvent circumstances, voluntarily, or bonâ fide in consequence of the defendant's pressure: and they found a verdict for the plaintiffs, damages £872.

In this Term (April 25),

Baines moved for a new trial, on the ground of misdirection.—The learned Judge ought to have stated to the jury, that, in order to avoid these payments on the ground that the defendant had at the time the view and intention of petitioning the Insolvent Debtors' Court, it must appear that he contemplated that as the necessary result of his then situation, and not as one of several alternatives. It did not appear that he contemplated becoming an insolvent debtor more than being made a bankrupt. To avoid a payment under this statute, it must be shewn that the party intended to defeat the distribution of his effects under the Insolvent Act. [*Parke*, B.—I think, upon the evidence, he must be taken to have intended to petition the Insolvent Debtors' Court, if he were not intercepted by his creditors making him a bankrupt.] The question is, whether that is sufficient to satisfy the statute. [*Parke*, B.—Yes; he appears to have contemplated an application under the Insolvent Act, so far as depended on himself, if others did not take other steps against him. According to your argument, neither the insolvent nor the bankrupt assignees could sue. *Alderson*, B.—Is not the true construction this,—that if *amongst other results* the party contemplates insolvency, and makes the payment to defeat an equal distribution of his effects among his creditors, that is sufficient? *Parke*, B.—If he does it, contemplating either bankruptcy or insolvency, then, if insolvency intervenes, the insolvent assignees are entitled to sue; if bankruptcy, the assignees in bankruptcy.] But here the case includes not only those two alternatives, but also that of the execution of a composition deed, and so resembles the case of

Fidgeon v. Sharp (a). [Rolfe, B.—That would always be an alternative, express or implied.]—He then urged that the verdict was contrary to the evidence, and that there ought on that ground to be a new trial.

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The Court took time to consult *Coltman, J.*, and on this day intimated that no rule would be granted.

Rule refused.

(a) 5 Taunt. 359 ; 1 Marsh. 196 ; 2 Rose, 153.

GOUGH and Another, Assignees of Benjamin and William Cribb, Bankrupts, v. ROBERT CRIBB.

May 6.

CASE.—The first count of the declaration stated, that before the committing of the grievances by the defendant next mentioned, and before the said Benjamin Cribb and William Cribb became bankrupts, they had jointly executed and delivered to the defendant a certain warrant of attorney, bearing date the 16th of May, 1840 [describing it], which said warrant of attorney was and is subject to a certain memorandum or defeazance, whereby it was declared that it was given to secure the payment to him the de-

In case by assignees of C., a bankrupt, the declaration stated, that, before the bankruptcy, C. executed to the defendant a warrant of attorney, subject to a defeazance, stating that it was given to secure the payment to the defendant of a

certain sum, to wit, 23*l.* 17*s.*, balance of account, and of any other sums which the defendant might be called upon to pay under guarantee &c., for C.; and alleged, that, although at the time of executing the warrant of attorney, the defendant had not entered into any guarantee &c. for C., nor ever became liable to pay any sum of money on his behalf, and although, at the time of executing the warrant of attorney, a small sum of money, to wit, the sum of money as aforesaid, and no more, was due from C. to the defendant on the warrant of attorney and defeazance, and it was the defendant's duty to issue execution for that sum only, being such balance as aforesaid, with interest, &c., and no more; yet the defendant wrongfully caused a writ of *fi. fa.* to be issued, founded upon the judgment entered up on the said warrant of attorney, indorsed to levy 103*l.* 10*s.* for debt, costs, &c., under which the goods of C., of value sufficient to satisfy that sum, were seized and sold before the bankruptcy, and thereby wholly lost to the plaintiffs as assignees. To this declaration the defendant pleaded not guilty, and that, after the time of executing the warrant of attorney, and before the execution, a large sum of money, to wit, £100, was due from C. to the defendant upon the warrant of attorney and defeazance, in addition to the said balance of account in the declaration mentioned, on which issues were joined:—*Held*, that, on these pleadings, it was incumbent on the plaintiffs, in order to recover in the action, to prove that no more was due to the defendant than 23*l.* 17*s.*, the balance of account mentioned in the declaration.

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the premises, and according to the terms and condition of the said warrant of attorney and defeazance, to have caused and procured the said writ to be indorsed to levy, besides costs of suit, &c., only the aforesaid sum, being such balance as aforesaid, with interest, &c., and no more : yet the defendant, well knowing the premises, but contriving and intending to injure and aggrieve in that behalf the said B. Cribb and W. Cribb, afterwards, and before they became bankrupts, to wit, on the 22nd August, 1842, wrongfully and unjustly caused and procured a certain writ of fieri facias to be issued, &c., founded on the said judgment so entered up under colour and pretence of the said warrant of attorney, &c. [stating a fi. fa. against B. and W. Cribb, for £200 debt and 3*l.* 10*s.* costs], and then wrongfully and injuriously caused and procured the said writ to be indorsed to levy 103*l.* 10*s.*, as being due upon the said warrant of attorney and judgment, and interest thereon from &c., besides sheriff's poundage, &c. &c.; and afterwards, and before the said B. Cribb and W. Cribb became bankrupts, wrongfully and unjustly caused the said writ, so indorsed as aforesaid, to be delivered to &c., being sheriff of Middlesex, and then caused and procured certain goods and chattels of great value, to wit, of value sufficient to satisfy the said sum of money and interest, &c., the same then being the goods and chattels, and in the lawful possession of the said B. Cribb and W. Cribb, (and which, had the same not been taken in execution in manner herein-after mentioned, would, upon the bankruptcy of the said B. Cribb and W. Cribb, and upon the plaintiffs being appointed such assignees as aforesaid, have come to the hands of the plaintiffs as part of the estate and effects of them the said B. Cribb and W. Cribb), to be seized and taken in execution, and sold and disposed of by the said sheriff, under colour and pretence of the said writ, for and towards payment and satisfaction of the said sum of 103*l.*

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10*s.* &c. ; whereby the said goods and chattels have been and still are wholly lost to the plaintiffs, as such assignees as aforesaid, &c.

The second count was for causing a second writ of testatum fi. fa. to issue against the bankrupts, indorsed to levy 75*l.* 13*s.* 9*d.*, after the balance in the first count mentioned had been paid and satisfied to the defendant. There were also two counts in trover.

The defendant pleaded not guilty ; and also, to the first count, that after the time of executing the said warrant of attorney, and before and at the time of the committing of the said supposed grievances, a large sum of money, to wit, the sum of £100, was due from the said B. Cribb and W. Cribb, on their joint account to the defendant, by virtue of the said warrant of attorney and defeazance, in addition to the said balance of account in that count mentioned ; concluding to the country. And to the second count, that after the executing of the said warrant of attorney, and before the issuing of the said writ of fi. fa. in the second count mentioned, the balance on the first count mentioned was not paid or satisfied to the defendant, in manner and form, &c. : concluding to the country. There were also other pleas, traversing material allegations in the declaration, but which it is not necessary for the purpose of this report to state.

At the trial before Lord *Denman*, C. J., at the last Hertford Assizes, the proceedings under the fiat against B. and W. Cribb having been proved, the deposition of the defendant before the commissioner of bankruptcy, on the last examination of the bankrupts, was tendered in evidence for the plaintiffs. It appeared that the defendant had been examined also at two former hearings before the commissioner ; and it was contended on his behalf, that his depositions on those occasions also should be put in together with the other. The Lord Chief Justice overruled the objection,

on the ground that the latter contained no reference to the former examinations, and it was accordingly read. It did not however appear from it, nor was any other evidence given to prove, that a larger sum was not due from the bankrupts to the defendant, at the time of the execution, upon the warrant of attorney, than that alleged in the declaration, viz. 23*l.* 17*s.* It was insisted however for the plaintiffs, that upon the issue on not guilty, it was admitted that that sum alone was due upon the warrant of attorney, and that the only fact in issue was, whether the defendant issued the execution for the 103*l.* 10*s.* The Lord Chief Justice, in summing up, left it to the jury to say whether the plaintiffs had made out to their satisfaction that the defendant took out the execution when only 23*l.* 10*s.* was due. The jury found a verdict for the plaintiffs on the first and second counts of the declaration, with £150 damages, and were discharged by consent as to the third and fourth counts.

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Early in this term, *Channell*, Serjt., obtained a rule to shew cause why the verdict should not be set aside, and a new trial had; on the grounds, first, that there was no evidence to go to the jury in support of the first count of the declaration; secondly, that upon the second count the verdict was contrary to the evidence; and thirdly, that the defendant's examination ought not to have been received in evidence.

Platt and *E. James* (with whom was also *Thesiger*) now shewed cause.—The first count was supported by the evidence. [*Alderson*, B.—It did not appear that more was not due than the 23*l.* 17*s.*] It is submitted that that was not in issue under the plea of not guilty, but only whether the defendant made the levy alleged in the declaration. It is like the case of an action for a false return, where all that is in issue under not guilty is, whether the defendant

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made the return alleged: *Wright v. Lainson* (a), *Lewis v. Alcock* (b). The prefatory allegations in both cases are precisely the same. All that the defendants say by their plea of not guilty in this case is, that they are not guilty of making a levy on the bankrupts' effects to the amount of 103*l.* 10*s.* [*Alderson*, B.—Is not the *wrongful act* the issuing of execution for a larger sum than 23*l.* 17*s.*? *Parke*, B.—Is it not as if the plea had concluded with a special traverse of the fact that the defendant had entered into a guarantee for any sum beyond the 23*l.* 17*s.*? Under the old plea of not guilty, you must have given some evidence that no more was due than 23*l.* 17*s.* The question is, does the defendant's taking an affirmative issue alter the burden of proof?] The plaintiffs could hardly be bound to prove the negative of the defendant's affirmative allegation. [*Parke*, B.—It is in form an affirmative issue, but in reality it is a negative of the material allegation in the declaration, that no greater sum was due. *Alderson*, B.—Suppose the second special plea alone were on the record, and no evidence were given on either side, the Judge must have directed a verdict for the defendant, because the plaintiff did not establish the fact necessary to sustain his case, that the guarantee was given for no more than 23*l.* 17*s.*] At all events, the plaintiffs are entitled to retain their verdict on the second count of the declaration. [*Alderson*, B.—How can you sever the damages, which are uncertain on each count?]

Bovill (with whom was *Channell*, Serjt.), *contra*, was stopped by the Court.

PARKE, B.—There is no doubt that on these pleadings the burden of proof is not altered, but still rests on the plaintiffs. Taking the not guilty and the special pleas together, they amount to the same as the old plea of not guilty. The burden of proof, therefore, being on the

plaintiffs, the learned Judge ought to have told the jury that there was no evidence to support the first count, inasmuch as there was no evidence that no more was due to the defendant than 28*l.* 17*s.* at the time of his issuing execution on the warrant of attorney. The rule must therefore be absolute for a new trial.

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The rest of the Court concurred.

Rule absolute.

SKINGLEY v. SURRIDGE and Another.

May 11.

REPLEVIN for taking the plaintiff's goods and chattels in the parish of Great Coggeshall, in the county of Essex, and detaining the same against sureties and pledges.

Avowry and cognizance, that the defendants took and detained the said goods and chattels under and by the authority of a certain act of Parliament, (43 Eliz. c. 2, s. 19), and according to the tenor, purport, and effect thereof.

Plea in bar, that the defendants of their own wrong, and without the cause or matter of excuse alleged, took and detained the said goods and chattels of him the plaintiff: upon which issue was joined.

At the trial before *Patteson*, J., at the last assizes for the county of Essex, it appeared that the plaintiff was one of

The goods of one churchwarden are liable to be seized under a distress made by order of the other churchwarden and the overseers for a poor rate due from him, where the rate has been legally demanded, and payment of it refused; but if such churchwarden has charged himself in his account with the rate as received,

to apply it to parochial purposes, the justices (who act judicially in such cases), in the exercise of their discretion, may refuse to grant a warrant.

Where a party was elected to be assistant overseer of the poor of a parish by the vestry, under 59 Geo. 3, c. 12, s. 7, and was appointed assistant, by the warrant of two justices, to perform the duties of overseer; but the resolution of the vestry electing him did not specify the duties to be performed by him:—*Held*, that this was an appointment within the statute; for though it did not in express terms, yet it did by necessary implication, specify the duties to be performed, as it necessarily implied that the parishioners, by electing him, meant him to be assistant overseer in all respects, and to perform all the duties of an overseer.

A warrant of distress directed the officer to levy the sum of 28*l.* 5*s.* 5½*d.* (the amount of a poor rate), and also the further sum of 11*s.* 6*d.* for costs incurred, making in the whole the sum of 28*l.* 16*s.* 11½*d.*, together with the reasonable charges of taking and recovering the said distress. The goods seized under the warrant were replevied, and the defendants made cognizance, justifying the seizure of the goods only, under the 43 Eliz. c. 2, s. 19:—*Held*, that the distress was not illegal, as the defendants did nothing but what they could justify under the warrant of distress for the poor rate alone.

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the churchwardens of the parish of Coggeshall up to Easter Monday, the 28th March, 1842. At a vestry held on the 10th of March in the same year, an assessment was made for the relief of the poor of the parish of Coggeshall, after the rate of 1s. in the pound. It was signed by the plaintiff's co-churchwarden and by the four overseers, and was afterwards allowed by two justices, and duly published. In that rate the sum assessed upon the plaintiff was 28*l.* 5*s.* 5½*d.*, which sum was demanded of the plaintiff by a person of the name of William Till, who was stated to be an assistant overseer. The minutes of the vestry were produced, and from them it appeared that, at a meeting held for the purpose of appointing an assistant overseer, William Till was by a general resolution declared "duly elected, at a salary of £40 per annum." His appointment by the magistrates was also given in evidence, which was as follows:—"Whereas the inhabitants of the parish of Great Coggeshall, in the county of Essex, in vestry assembled in the said parish on the 17th day of June last past, did nominate and elect William Till the younger of Great Coggeshall aforesaid to be an assistant overseer of the poor of the said parish, and *did determine and specify* that he should execute all the duties of the said office of an overseer of the poor of the said parish, and did fix the yearly sum of £40 as and for the yearly salary of the said William Till for the execution of his said office: now we, two of her Majesty's justices of the peace in and for the said county, in pursuance of the statute in such case made and provided, do hereby appoint the said William Till to be an assistant overseer of the poor of the said parish, and we do hereby authorize and empower him to execute and perform the said duties and to receive the said salary so as aforesaid fixed by the said inhabitants in their said vestry."

The plaintiff having refused to pay the amount demanded, was summoned before the justices, and at the hearing appeared by his attorney, who took several objections to the

validity of the rate. These objections were, however, over-ruled by the justices, who issued a warrant of distress, which was in the following form :—"To the churchwardens and overseers of the poor of the parish of Great Coggeshall, in the county of Essex, and to the constables of the said parish, aiding and assisting therein. Whereas in and by a rate and assessment allowed and published according to the statute in that case made and provided, bearing date the 10th day of March in the year 1842, Charles Joseph Skingley, an inhabitant and occupier of messuages and lands in the said parish of Great Coggeshall, was duly rated and assessed for and towards the relief of the poor of the said parish in the sum of 28*l.* 5*s.* 5½*d.*: and whereas it duly appeareth unto us, two of her Majesty's justices of the peace in and for the said county, as well upon the oath of W. Till, assistant overseer of the poor of the said parish, as otherwise, that the said sum hath been lawfully demanded by him, and that the said Charles Joseph Skingley hath been duly summoned to shew cause why he refuseth to pay the said rate and assessment, but the said C. J. Skingley hath not appeared according to such summons, and hath not shewed to us sufficient cause why the same should not be paid : These are therefore to require you forthwith to make distress of the goods and chattels of the said C. J. Skingley, and if within the space of five days next after such distress by you taken, the sum of 28*l.* 5*s.* 5½*d.*, and also the further sum of 11*s.* 6*d.*, being the costs incurred in the premises, making in the whole the sum of 28*l.* 16*s.* 11½*d.*, together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale thereof, that you detain the said sums, and also the reasonable charges of taking, keeping, and selling the said distress, rendering the overplus, on demand, unto the said C. J. Skingley ; and if no such distress can be made, that then you certify the same

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unto us, to the end that such further proceedings may be had as to the law doth appertain. Given under our hands and seals this 12th day of April, A. D. 1842." The defendants, in obedience to this warrant, and acting in aid of the constable of the parish, seized the goods of the plaintiff, which was the subject of the present action.

It was objected at the trial, first, that the plaintiff being himself one of the churchwardens, and as such being, by the stat. 43 Eliz. c. 2, s. 1, also an overseer, he must be considered as having the rates in his own hands for the purposes of the poor laws, and his goods were not liable to be distrained for rates due from him, which must be considered as paid: for which the cases of *Wethered v. Calcutt* (a), and *Rex v. The Justices of Gloucestershire* (b), were cited. Secondly, that Till was not duly appointed to be an assistant overseer, because, although elected by the vestry, under 59 Geo. 3, c. 12, s. 7, and appointed by the warrant of two justices to perform the duties of an overseer, he was not duly appointed, inasmuch as the vestry did not specify that all those duties were to be performed by him; and therefore he was not a person legally authorized to demand the rate, and the warrant on that account could not be supported; and *Bennett v. Edwards* (c) was cited. Thirdly, that the distress was illegal, because the costs of the summons, &c., were included, the defendants having made cognizance under the stat. 43 Eliz. c. 2, which did not give the justices any power to direct the costs to be levied. The learned Judge directed the jury to find a verdict for the defendants, giving the plaintiff leave to move on all the above points, and to enter a verdict for 4*l.* 4*s.*, if this Court should be of opinion that he was so entitled.

Thesiger having obtained a rule accordingly,

(a) 11 Law J. (N. S.), Mag. Cas. 123.

(b) 1 B. & Ad. 1.

(c) 7 B. & Cr. 586; 2 Mán. & R. 482.

Peacock shewed cause (May 5).—The first question is, whether one churchwarden or overseer can distrain upon another for the poor rate due from him. It cannot be disputed that a churchwarden is liable to be assessed to the poor under the 43 Eliz. c. 2, s. 1; and the 4th section enacts, “that it shall be lawful for the churchwardens and overseers, or any of them, by warrant from any two justices of the peace, to levy the sums of money assessed, and all arrearages, of every one that shall refuse to contribute according as they shall be assessed, by distress and sale of the offender’s goods; and in default of distress to commit him or them to the common gaol of the county until payment of the said sums and arrearages, and to commit to the said prison every one of the said churchwardens and overseers who shall refuse to account, there to remain without bail or mainprize, until he have made a true account, and satisfied and paid so much as upon the said account shall be remaining in his hands.” But it will be said that one overseer has no greater right to have the poor rate in his hands, or to administer it, than another; and that the plaintiff, being an overseer, had a right to retain the rate in question, and must be considered as having it in his own hands, and liable to account for it at the expiration of his office, and so not bound to pay it over to any of the other overseers. Now, if the churchwarden had settled and made up his accounts, and accounted for the sum assessed upon him, there might be some ground for this argument; but the fallacy here is, that there is nothing to shew that he has ever elected to pay the rate at all, he never having accounted for it. An overseer cannot be entitled to retain the rate until he goes out of office, because the rate is to be distributed for the relief of the poor before the end of the year. [*Alderson*, B.—The overseer may be compelled to relieve the poor, and if he has not paid his own rate, he could not get a new rate allowed by the magistrates.] The other overseers would relieve the poor, and they are en-

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titled to call for the rate from him, and may apply to a magistrate to compel him, if he does not pay it. If it were essential to the validity of the distress that all the overseers should join in the application to the justices, there might be some foundation for the argument on the other side: but it is only necessary for a single overseer, acting in his politic capacity, to apply, in order to set the justices in motion. *Dent v. Prudence (a)*. The plaintiff, having been assessed, could only object to pay the rate on the ground, either that he was not the occupier of the premises in respect of which he was assessed, or that the rate had been paid. The 4th section gives power to any one of the parish officers, by warrant from two justices, to distrain for the rate. It would be very inconvenient if it were held that an overseer were not compellable to pay his rate until the expiration of his office.

The second objection is, that the warrant is bad, because Till had not been properly appointed to be an assistant overseer. The stat. 59 Geo. 3, c. 12, s. 7, enacts, "that it shall be lawful for the inhabitants of any parish, in vestry assembled, to nominate and elect any discreet person to be assistant overseer of the poor of such parish, and to determine and specify the duties to be by him executed and performed, and to fix such yearly salary for the execution of the said office as shall by such inhabitants in vestry be thought fit: and it shall be lawful for any two justices of the peace, and they are hereby empowered, by warrant under their hands and seals, to appoint any person so nominated and elected to be assistant overseer of the poor, for such purposes and with such salary as shall have been fixed by the inhabitants in vestry." And it further enacts, that "every person to be so appointed overseer shall be and he is hereby authorized and empowered to execute all such of the duties of the office of

overseer of the poor as shall in the warrant for his appointment be expressed, in like manner, and as fully to all intents and purposes, as the same may be executed by any ordinary overseer of the poor." Now, it is said here that Till's appointment was invalid, because the vestry had not fixed the duties he was to perform. But it must be presumed, in favour of the resolution, that the vestry, having elected Till to be assistant overseer, intended that he should perform all the duties of an overseer. Besides, he had the authority of the overseers to demand the rate. But even if it had appeared that the warrant had been obtained without information, it would still be good; therefore the recital in it, that it appeared on the oath of Till that the rate had been duly demanded, was immaterial, as it was unnecessary.

Then the third objection is, that the warrant is bad, because the sum of 11s. 6d., for the costs of the summons and hearing before the justices, was included in it, there being no power given by the 43 Eliz. c.2, under which the defendants made cognizance, to award costs. The answer to that objection is, that the defendants justify only the making of the distress, and not the sale; and though the warrant might be bad as regards the sale, it justified them in making the distress. And in *Ramsey v. Normabell* (a), it was held that whether a sale was justifiable or not, the cognizance was good, because it did not shew that a sale had been made in fact, though directed by the warrant. But then it is said, that if the warrant is bad in part, it is bad altogether: and *Sibbald v. Roderick* (b) will be relied on. But the warrant in that case is very distinguishable from the present, because there the sums were not severable, as the warrant specified one entire sum as the rate; but if the warrant had distinguished the rates, some of which were good, and

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(a) 11 Ad. & Ell. 383; 3 Per. & D. 253.

(b) 11 Ad. & Ell. 38; 3 Per. & D. 106.

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some bad, the churchwardens might have justified that they distrained for the good rates. In *The Governors of the Poor of Bristol v. Wait* (a), it was held, that if a joint distress be made under four several warrants, for four several rates, of which one is bad, the distress is not therefore void. The defendants here were entitled to justify under that part of the warrant which commanded them to distrain for the amount of the rate itself. But the warrant was good on the face of it, even as regarded the costs. The stat. 18 Geo. 3, c. 19, s. 1, expressly enacts, "that it shall be lawful for any justice or justices, who shall have heard and determined the matter of complaint, to award such costs to be paid by either of the parties, and in manner and form as to him or them shall seem fit, to the party injured." But then it is said there was no award of costs, pursuant to the form given in the schedule to that act for the awarding of costs; but that was not the ground of objection taken at the trial, and it can only now be objected that the warrant is bad. At all events, the defendants only acted upon that part of the warrant which commanded them to distrain for the rate, which they can fully justify.

Thesiger (*Montagu Chambers* with him) in support of the rule.—First, one overseer cannot distrain upon another for the rate made upon him, on the ground that he has the rate in his hands. There is no difference between that money and the money of other rate-payers which he may have collected, and there is no power in the churchwardens or overseers to compel the payment from their co-overseer. (He referred to *Rex v. The Justices of Gloucestershire* (a).) No doubt, the churchwarden must account at the end of the year; and if the poor want relief, the justices would see that the former rate had been applied before they granted a new one. The first section of the 43 Eliz. c. 2

(a) 1 Ad. & Ell. 264; 3 Nev. & M. 359.

(b) 1 B. & Adol. 1.

makes a distinction between churchwardens and overseers, and the inhabitants generally. The former are considered by the legislature as distinct persons in the parish, who are to put the law in force, and the remedy against whom is by calling upon them to account, and, in case of their refusal, committing them to prison, under the 4th section of the statute. But they have no remedy to enforce the payment of the rate *inter se*, but only as against the other inhabitants. The stat. 17 Geo. 2, c. 3, s. 3, enacts, "that if any churchwarden or overseer shall not permit any inhabitant or parishioner to inspect the rates, or shall refuse or neglect to give copies thereof, he shall forfeit to the party grieved 20*l*." and in *Wethered v. Calcutt (a)*, it was held that the words "churchwarden or overseer" are used in contradistinction to the word "inhabitant;" and therefore that an overseer cannot bring an action on this statute against a co-overseer for refusing him a copy of the rate.

Secondly, Till was not properly appointed, and therefore the demand by him was not a demand legally authorized, and the warrant, being grounded on that demand, was invalid. He was not properly appointed assistant overseer, under the 59 Geo. 3, c. 12, s. 7, the duties that he was to perform not having been specified and determined by the vestry as required. In *Bennett v. Edwards*, it was held that an assistant overseer, appointed by a select vestry under 59 Geo. 3, c. 12, is not liable to the penalties imposed by 17 Geo. 2, c. 3, s. 3, upon overseers not permitting inhabitants to inspect the rate, unless it be proved that the select vestry have imposed upon such assistant overseer the duty of producing the rate to the inhabitants. And *Holroyd, J.*, there says, "The law knows what an overseer is, but it does not know what is an assistant overseer. He may be appointed generally to do all the business of an overseer, as a deputy, or only to keep the accounts, or perform

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(a) 11 Law J. Rep. (N. S.), Mag. Cas. 123.

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other particular business." The appointment in this case was clearly invalid, as no duties were specified in it. Till had, therefore, no power to demand the rate, as he could give no valid discharge for it; and an overseer cannot delegate his authority for levying a rate. There must be a lawful demand of the precise sum which the party is liable to pay, by a person having authority to receive it, and give a valid discharge for it. There is here no evidence to shew that Till had authority to make a lawful demand of the rate, and therefore the warrant is invalid on that ground.

Thirdly, the warrant was also bad, inasmuch as it included the costs, which the justices had no authority to award under this statute. The warrant authorizes the defendants to seize the goods of the plaintiff for the whole amount, including the costs. This is not like the case of *The Governors of the Poor of Bristol v. Wait*, because there three of the warrants were perfectly valid. There is no power in the 18 Geo. 3, c. 19, to award costs in this manner, but only according to the form given in the schedule, and that statute applies only to convictions on complaints coming before justices of the peace out of sessions. [*Parke, B.*—The warrant is not void for introducing the costs.] It is submitted that it is, according to *Hurrell v. Wink* (a), and *Sibbald v. Roderick*. In the former case it was held, that the party rated was entitled to a precise demand of the sum actually due for the rate, previously to the issuing of the warrant of distress. And in *Sibbald v. Roderick*, where some rates had not been duly published, and a warrant of distress issued for a single sum, made up of these rates, and of others which were regular, it was held that the warrant was wholly bad, and that replevin lay for a distress taken under it. In the present case, the warrant was to levy an entire sum, and

the defendants seized the plaintiff's goods until he paid the whole sum, including the costs; and he could not have obtained a release of his goods until he paid both the legal and the illegal demand.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This was an action of replevin, with an avowry, under the statute of Elizabeth, for non-payment of a poor-rate. The points reserved by my brother *Patterson* for the opinion of the court were three:—

1st, Whether the goods of one churchwarden were liable to be seized under a distress made by order of the other churchwarden and overseers, for a poor-rate due from him.

2ndly, Whether a demand of the rate by a person who acted as assistant overseer was sufficient to support the warrant of distress, and, if not, whether the warrant was bad on that account.

3rdly, Whether the distress was illegal, by reason of the warrant being for 11s. 6d., costs of the summons and proceedings before the magistrates, as well as for the rate, or could be justified under the general avowry.

We think that none of these objections ought to prevail.

The first is the most important. The argument for the plaintiff is, that one churchwarden or overseer has as much right to receive the poor-rate as another; and that, being also a person who is to pay, he may be considered as having already paid the sum for which he was rated to himself: that he would therefore be accountable for it, but could not be compelled to pay it to the other officers. And if the rate could be recovered only by action, or other proceeding to which all the churchwardens and overseers were necessary parties, there would be great weight in the objection, as the same person could not both sue and be sued. The case would be analogous, in this respect, to that of one

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of several debtors being made an executor to the creditor, or a debtor and several others being made co-executors to a creditor, where the same person could not be plaintiff and defendant, and the law considers the debt as paid, and the executor is accountable for the amount as assets. But this is not the situation in which one parish officer stands with respect to the others. All need not join in an application to a justice to enforce the payment of a rate by a warrant of distress: the complaint of one is sufficient; and, consequently, the simple fact that one is a churchwarden or overseer, and liable to the rate, does not amount to a payment by him of the rate to himself. But if one overseer is willing to charge himself with the amount of the rate due from himself, as received, and to apply it for parochial purposes, the justice of the peace, if satisfied of that fact, would have a discretion (for they act judicially (*a*) in this case) not to allow another overseer to have a warrant against him; which they would, if there was a refusal to pay the rate altogether. Whether, then, one parish officer could distrain on another for the rate, would depend upon the question, whether that other refused to pay his rate or not. In this case there was, beyond a doubt, a refusal altogether to pay, and the magistrates were justified in granting a warrant of distress. The case of *Wethered v. Calcutt* is not an authority applicable to this case. The decision of the Court of Common Pleas upon the words of the stat. 17 Geo. 2, c. 3, s. 3, which makes a churchwarden or overseer liable to a penalty for not giving a copy of a rate to any *inhabitant or parishioner*, was, that the latter words were used in contradistinction to churchwardens and overseers; and, consequently, no such penalty attached to one churchwarden or overseer for refusing a copy to another.

The second question is, whether the warrant was valid,

(*a*) *Harper v. Carr*, 7 T. R. 274.

as being grounded on a demand and refusal of the rate by Till, who it is said was not an overseer. The objection to Till's appointment was, that though elected to be the assistant overseer of the parish by the vestry, under 59 Geo. 3, c. 12, s. 7, and appointed by the warrant of two justices an assistant-overseer, to perform all the duties of an overseer, he was not duly appointed, because the vestry did not specify that all those duties were to be executed by the assistant overseer, and, unless they did, the justices had no power to appoint. The minutes of the vestry were given in evidence, and contained a memorandum of the appointment of Till to be assistant overseer, generally, and without qualification. We think that this is an appointment within the terms of the statute; because, though it does not in express terms, yet it does by necessary implication, determine and specify the duties to be performed; for it necessarily implies that the parishioners, in vestry assembled, meant that he was to be assistant overseer *in all respects*, and perform all the duties of *an overseer*. If it did not, the appointment would have been void, by reason of its not having specified the particular duties to be performed; and we ought not to construe the act to be a nugatory one. There cannot be a doubt that the parish meant to give all the powers and duties of a principal overseer, and the minute of appointment was so understood by the justices, who signed the warrant of appointment. We therefore think that Till was duly appointed, and the demand by him was sufficient; and the warrant of distress therefore was, in this respect, good.

The last objection was, that the distress was illegal, because 11s. 6d., the costs of the summons and hearing before the two justices who granted the warrant, were included; and that the claim for these costs was not authorized by law. If this demand for costs had not been legal, it would have followed that the distress was illegal; because, on the face of the warrant, the sum demanded for

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the rate (which on this branch of the argument is assumed to be legally demanded) is distinguishable from the sum which is assumed to be illegally demanded: the rate legally due was duly claimed and refused; and the plaintiff had the means of tendering the precise sum to save the necessity of seizing or selling, and nothing was done under that distress, which the warrant to distrain for the poor-rate did not justify. The case, therefore, differs from that of *Milward v. Caffin* (a), *Sibbald v. Roderick* (b), and *Hurrell v. Wink* (c), cited in the argument, in which the legal could not be distinguished from the illegal part, and there had been no demand of that sum which was legally due.

The sum of 11s. 6d. was, however, due in this case, under the stat. 18 Geo. 3, c. 19. It was said that there was no proof that the sum had been awarded for costs in the form given by that statute, but this was not made the ground of objection at the trial.

It was urged that this sum could not be recovered by distress under the statute of Elizabeth, nor could it; nor could the distress for it be justified under the general form given by that statute, which is equally true. But here the defendants did not need to justify the distress for that sum at all. They did nothing, except what they were authorized to do under the warrant of distress for the poor-rate alone. If, after the poor-rate had been paid, they had sold to raise the amount of costs, or even continued in possession, they must have justified specially under the stat. 18 Geo. 3, but nothing of this sort was done.

Rule discharged.

(a) 2 W. Bla. 1330. (b) 11 Ad. & Ell. 38. (c) 8 Taunt. 369.

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May 3.

EJECTMENT to recover a messuage and premises, copyhold of the manor of Brotherton, in the county of York, claimed by the lessor of the plaintiff as assignee under the bankruptcy of one Joseph Boggett. At the trial before Lord *Denman*, C. J., at the last Summer Assizes at York, the following facts appeared in evidence:—

By surrender dated 7th July, 1798, in consideration of the sum of £185, William Pinder and Sarah his wife surrendered the premises in question to the use and behoof of the said Joseph Boggett and Sarah his wife, and of the heirs and assigns of the said Joseph Boggett for ever; and on the 16th of October, 1798, Joseph Boggett and Sarah his wife were duly admitted upon that surrender. In the year 1805, Boggett, who had carried on the business of a wheelwright and grocer at Brotherton, absconded to America, and had never since been heard of. His wife subsequently went to reside on the premises in question, having finished a new house which was in the course of building when Boggett absconded, and lived there until her death in March, 1841. On the 18th March, 1807, a commission of bankruptcy issued against Boggett, under which he was adjudged a bankrupt, and the lessor of the plaintiff was duly appointed his assignee, and an assignment in the usual form was made to him by the commissioners. On the 1st November, 1841, the lessor of the plaintiff was admitted to the copyhold estate as assignee of Boggett. In order to prove the trading, petitioning creditor's debt, and act of bankruptcy, the depositions taken under the bankruptcy were tendered in evidence, being produced by the solicitor to the commission, and sealed with the seal of the Court

The 90th section of the Bankrupt Act, 6 Geo. 4, c. 16, applies to actions afterwards brought to trial by assignees acting under commissions which were issued before the passing of the act, as well as to actions by assignees under future commissions.

That section applies to actions of ejectment by an assignee.

Copyhold lands were surrendered, in 1798, to husband and wife, for their joint lives, with remainder to the heirs of the husband. In 1805, the husband absconded and went abroad, and was never afterwards heard of. In 1807, a commission of bankruptcy issued against him, and the usual assignment of his estate was made by the commissioners to his assignee. The wife occupied the copyhold estate until her death

in 1841, whereupon the assignee was admitted:—*Held*, that an ejectment by the assignee, brought after her death, was in time, for that the husband's reversion in fee was a *future estate*, within the meaning of the 3 & 4 Will. 4, c. 27, s. 3.

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of Bankruptcy. It was objected on the part of the defendant, that the stat. 6 Geo. 4, c. 16, s. 90, did not extend to actions of ejectment; and that even if it did, it did not apply to commissions issued before the passing of the act; and therefore that the depositions were inadmissible in evidence. For the plaintiff it was insisted, that the depositions were evidence by force of the statute; but that, even if the 90th section were not applicable, the commission of bankruptcy, being upwards of thirty years old, and having been acted upon, bore in itself sufficient evidence of its validity. The learned Judge received the evidence, reserving the point. It was then further contended for the defendant (who claimed under a devise from Mrs. Boggett) that the copyhold estate did not pass by the bargain and sale from the commissioners of bankrupt to the lessor of the plaintiff; or that if it did, the *whole* estate, as well that of which the bankrupt was seised in his own right and jure uxoris, for life, as his reversion in fee, passed at one and the same time, and therefore the action was barred by lapse of time. The Lord Chief Justice reserved this point also, and a verdict was taken for the plaintiff, the defendant having leave to move to enter a nonsuit.

In Michaelmas Term last, *Crompton* obtained a rule nisi accordingly; against which

Baines and *Cowling* shewed cause in this term (April 27). —First, the stat. 6 Geo. 4, c. 16, s. 90, is applicable to this case. That section enacts, that, “in any action by or against any assignee, &c., no proof shall be required at the trial of the petitioning creditor’s debt or debts, or of the trading or act or acts of bankruptcy respectively,” unless the other party shall give notice in manner therein mentioned, that he intends to dispute some and which of such matters. There is no distinction between cases where the assignee shews himself on the record to be suing as such, and others in which it is in reality an action by the assignee, though not described as such, and is brought for the benefit

of the estate: *Simmonds v. Knight* (a), *Rowe v. Lant* (b). And in a case before Lord *Tenterden* (c), an action of ejectment by an assignee was expressly held to be within the words of the statute. The defendant here had full means of knowledge that the lessor of the plaintiff was suing as such assignee; he appears as such upon the court roll, and in that character he demanded possession. But further, this clause of the act of Parliament is retrospective in its operation. *Bell v. Bilton* (d), *Ex parte v. Grundy* (e). Where it was intended that the statute should have a prospective operation only, it is expressly confined to *future* cases: as in sect. 57, entitling the holder of a bill or note on *future* commissions to prove for interest. So also in ss. 96 and 98. *Kay v. Goodwin* (f), in which it was held that the 92nd section of the statute is not retrospective, is distinguishable. The ground of that decision was, that to hold that section (which rendered the depositions, in the cases therein mentioned, *conclusive* evidence of the matters contained therein) to be retrospective, would materially alter the situation, both of the bankrupt, because he might be concluded as such without the possibility of his contesting his bankruptcy within the period of twelve months, which the statute meant to allow him for that purpose; and also of the parties claiming remedies under the commission, because the power given by sect. 93, of paying money into Court and staying the proceedings during the same period, would also by that construction be taken away from them, contrary to the intention of the act, as shewn in the 135th section, that the construction of it should be such as not to affect or lessen any right, claim, demand, or remedy, which any person then had under any subsisting commission. This 90th clause is a repeal of the former enactment on the

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(a) 3 Campb. 251.

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(b) Gow's N. P. C. 24.

(e) Mont. & M'Arth. 309.

(c) 2 Stark. Evid. 125, n.

(f) 6 Bing. 576; 4 M. & P.

(d) 4 Bing. 615; 1 M. & P. 341.

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apply to commissions previously issued, what is to become of them? Where a statute in general terms alters the pre-existing law and practice, it does so (except where injustice would follow from such a construction) as to all subsisting as well as future cases. Such is the principle laid down in the cases already referred to, and also in *Cuming v. Welsford* (a), which was decided on the 108th section of the same act, and *Elston v. Braddick* (b), on the 127th. The latter was a very strong case; because it might be said that that clause (whereby the estate of a trader, paying less than 15s. in the pound under a second commission, vests absolutely in his assignees), being construed retrospectively, would place him in a much more perilous position than under the old law. [Parke, B.—*Carew v. Edwards* (c) was a decision to the contrary.] A similar rule has, however, been laid down as to the construction of the 2 & 3 Vict. c. 29: *Moore v. Phillips* (d). But even if this point be doubtful, the commission being above thirty years old, having been duly acted upon, and coming from the proper custody, the Court will presume that all the preliminary matters were rightly done. *Wynne v. Tyrwhitt* (e), *Doe d. Oldham v. Wolley* (f). After such a lapse of time, a third party cannot turn round and say such a commission is bad. At all events, it is *prima facie* evidence of the assignee's title, until impeached by evidence to the contrary. But further, the depositions are evidence by virtue of the stat. 2 & 3 Will. 4, c. 114, s. 7, either by reason of the death of the witness who deposed to the trading and act of bankruptcy; or by s. 9, the proceedings purporting to be sealed with the seal of the Court of Bankruptcy.

Secondly, the lessor of the plaintiff is not barred by adverse possession, or lapse of time. Supposing Boggett

(a) 6 Bing. 502; 4 M. & P. 238.

(d) 7 M. & W. 536.

(b) 2 C. & M. 435.

(e) 4 B. & Ald. 376.

(c) 4 B. & Adol. 351; 1 Nev. & M. 632.

(f) 8 B. & Cr. 22.

to have died abroad, his wife has been in possession, under the same limitation, until within a few months of the time when the lessor of the plaintiff entered. It would have been of no use for him to take possession during her life, since she might have ousted him upon the death of her husband; and the fact of allowing her to retain possession cannot affect the right of the assignee to her husband's reversion in fee, which only became an estate in possession on her death. At all events, on her death, a new title, viz. in fee, would vest in the assignee, who is therefore within the 5th section of the Limitation Act, 3 & 4 Will. 4, c. 27. It has been decided that a reversioner is not barred until the lapse of twenty years after the determination of the prior estate. *Doe d. Davy v. Ozenham* (a), *Chadwick v. Broadwood* (b). Even supposing it to be necessary, under the 20th section, that some party having a prior estate should have recovered, then Mrs. Boggett has *recovered* within the meaning of the act, for she had an actual possession, which was acquiesced in, and this would be considered as existing by the sufferance of the assignee.

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Crompton, contra.—First, there was no sufficient evidence of the bankruptcy. The 9th section of the 2 & 3 Will. 4, c. 114, cannot be seriously relied on for that purpose. That clause only makes the commission, depositions, &c., when sealed with the seal of the Court, evidence, without further proof of their genuineness, but leaves the effect of the depositions in evidence as before. And it would be a case of the greatest hardship, if the 90th section of the 6 Geo. 4, c. 16, be held to apply to actions of ejectment. They are certainly not within the *words* of that section. An ejectment is not an action “by the assignee,” or one in which it is necessarily to be known that he is suing as assignee. A feigned issue, to try whether the plaintiffs

(a) 7 M. & W. 131.

(b) 3 Beavan, 308.

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were entitled to certain goods seized under a fi. fa., (the plaintiffs claiming them as assignees under the bankruptcy of the judgment debtor), has been held not to be within this section. *Lott v. Melville* (a). It would be a new practice to give notice of disputing a bankruptcy with the plea of not guilty in ejectment. In *Doe d. Mawson v. Liston* (b), it was held, that where the title of assignees of a bankrupt, strangers to the record, comes in question incidentally, it must be proved in the same manner as before the stat. 49 Geo. 3, c. 121, s. 10, although no notice of contesting the bankruptcy had been given by the opposite party. [*Parke, B.*—But the lessor of the plaintiff in ejectment is the real party to the record.]

Secondly, the 90th section is not retrospective. The cases of *Bell v. Bilton*, and *Ex parte Grundy*, cited on the other side, were considered by the Court of Common Pleas, and, in effect overruled, in *Kay v. Goodwin*. It was there said, that the 90th and 92nd sections were to be construed together; and it was upon a view of their combined operation, that the latter (which is not so stringent an enactment as sect. 90,) was held to be prospective only. *Key v. Cook* (c) is another decision on the same point. Surely the general rule is not, as has been said, that an act of Parliament is to be construed as retrospective, but the contrary; because otherwise it ex post facto affects the interests of third parties. The 90th section is altogether new, as to the dispensing with strict proof of the requisites of the bankruptcy. In *Kitchener v. Power* (d), these clauses were all treated as one code of law, giving a new kind of evidence. [*Parke, B.*—Reading the 90th section, and construing it in its grammatical sense, is it not this,—that in any action by or against any assignee, in which the bankruptcy comes in question, prospectively, it *shall*

(a) 2 Man. & G. 40; 3 Scott, N.

R. 346.

(b) 4 Taunt. 741.

(c) 2 M. & P. 720.

(d) 3 Ad. & E. 232; 4 Nev. & M. 710.

be so proved? Then can it be doubted that an assignee under a former commission is an assignee within those words, when it is remembered that the act itself, by the 135th section, expressly preserves all the rights of existing assignees? The clause is prospective as to the mode of proof, but surely it applies to assignees under existing as well as future commissions.]

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Then the plaintiff is barred by the Statute of Limitations. Under a limitation to husband and wife for life, with the reversion in fee to the heirs of the husband, *one estate* in fee simple only is created; and they are not joint tenants, but tenants by entireties. It is not shewn here when the husband died: if before the bargain and sale by the commissioners, the estate did not pass thereby, and the lessor of the plaintiff has no title at all. So, if he survived the wife, the assignee is barred. [*Parke, B.*—The evidence shews him to have been dead in 1812, by reason of the presumption of death after seven years' absence, and that is all.] There is great doubt upon the authorities whether this peculiar kind of estate can be alienated at all. But, at all events, whatever the husband has, it is *one estate*, and not severable, and can only be transferred as such. In Co. Litt. 184. b., it is said, "When land is given to two and the heirs of one of them, he in the remainder cannot grant away his fee-simple." Mr. Butler, in his note on this passage, after in some measure qualifying its doctrine, observes that Lord Coke seems justified by the words of the Year Book, which he cites as his authority, (12 E. 4, 2 b.), which are, that "if two have land to them and the heirs of one, he who hath fee cannot grant the reversion of his companion to another; but if both alien, all passes." It is sufficient for the present purpose, that all the estate the husband had would pass at once by the assignment. Then the assignee might at once have entered; and therefore the Statute of Limitations began to run from the date of the assignment. [Lord Abinger,

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C. B.—If the assignee had entered, he must have quitted the possession again on the husband's death, and then he could not re-enter until the wife's death.] That answer would equally apply if the assignee had remained in possession above twenty years. [*Parke, B.*—The case depends upon the wording of the new Limitation Act, and not upon any old rules of law.] This was in no sense a *reversion*, or a *future estate*, within the meaning of the 5th section of that act. A reversion is, where some party has another prior estate; but here, it is all *one* estate, which, if alienable at all, was alienable only as a fee-simple; *Wiscot's case* (a): and when it was so transferred, the statute began at once to run against the assignee. [Lord *Abinger, C. B.*—If he had entered in 1807, he must have given way to the wife's title in 1812. *Alderson, B.*—According to your argument, if Boggett had died two or three days only after the assignment, and the wife had continued in possession twenty years, nobody would have a right to enter. *Parke, B.*—You say it is within the 3rd section, and is one estate, and that the right of the assignee to enter *with the wife* accrued in 1807.] It never was a “future estate or interest,” within the exception of the 5th section, and the right of entry, as to the whole estate, therefore, accrued immediately upon the execution of the assignment.

Cur. adv. vult.

The judgment of the Court was now given by

PARKE, B.—This was an action of ejectment, brought by the assignee of a bankrupt, to recover possession of a copyhold estate, which copyhold estate had been surrendered, in the year 1798, to the use of the bankrupt and his wife, for their lives, with remainder to the heirs of the husband. The bankrupt went abroad in 1805, and be-

(a) 2 Rep. 61.

came bankrupt in 1807; and the bargain and sale was executed in that year. The wife, it appeared, continued to live upon the premises till her death in the year 1841, when the lessor of the plaintiff was admitted under the surrender and this action of ejectment was brought: and the question was, whether it would lie. Several objections were taken by Mr. *Crompton*, which were disposed of in the course of the argument; and the only point left for consideration was, whether the lessor of the plaintiff was barred by the new Statute of Limitations. Mr. *Crompton* contended, that as the bankrupt might be alive after the bargain and sale, in 1807, the assignee had at that time a right of entry; and that, if he was barred as to the then existing life estate of the bankrupt, he was barred also as to the reversionary estate, under which the assignee was entitled to possession in 1841; and he cited the authority of Co. Litt. 184. a. and b. that this was *one estate*. What is laid down by Lord Coke, in the passage referred to, and in *Wiscot's case*, is this:—"If land be granted to two, and the heirs of one of them, he in the remainder cannot grant away his fee-simple." For that purpose it is one estate: but it does not follow that parties in remainder may not enter, as well upon the determination of the whole estate as during the time of a particular estate. Whether that is or is not so, depends upon the construction to be put upon the new act for the limitation of actions relating to real property. And we are of opinion that this is a case of a *future estate or interest*, within the meaning of the third section of that act of Parliament; and that the lessor of the plaintiff, therefore, was not entitled to enter until the death of the wife, in 1841. It is clear, in this case, that Boggett, if he had not been bankrupt, would have been entitled to possession during the joint lives of himself and his wife; and it is equally clear, that upon the death of Boggett, the wife was entitled to possession for her life, and the heirs of Boggett

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on the expiration of their joint lives. There would, however, in this case, be only one interest; and the assignee being barred as to the estate in possession during the continuance of Boggett's life, it was urged that he was barred altogether, and that the 20th section of the statute would apply to the case. That section provides, "that when the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall, at any time during the said period, have been entitled to any other estate, interest, right, or possibility in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility." Then there is this proviso: "Unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right, which shall have been limited or taken effect under or in defeasance of such estate or interest, in possession." Now we think, supposing the 20th section to apply, this proviso also applies, because the wife had been in possession during the whole period of her life, until the time of her death; and though she had not recovered that possession by virtue of legal proceedings, it seems to us that it is a sufficient *recovery* for the purpose of this section, if she has been in actual possession during the whole period of her life. Until her death, therefore, there would be no right in the assignee to take possession. It follows, that this action was brought in time, and therefore the rule which has been obtained for a new trial must be discharged.

Rule discharged.

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ROBERTS v. ELLIOTT.

TRESPASS for assault and false imprisonment. The defendant pleaded not guilty, and also a justification by reason of a rescous by the plaintiff of a horse distrained damage feasant by the defendant, as a deputy common-keeper for the manor of Wimbledon; to which the plaintiff replied *de injuriâ*. At the trial before Lord *Denman*, C. J., at the last assizes for the county of Surrey, the appointment of the defendant was put in evidence. It was an unstamped paper, and was as follows:—

“Putney, 12th May, 1841.

“The Manor of Wimbledon.

“Mr. JAMES ELLIOTT,—We, the undersigned, having been appointed common-keepers for the parish of Putney, hereby nominate and appoint you our deputy for the lower common, and authorize you to act for us in that behalf, in all things pertaining to the rights and privileges of the lord, and the tenants of the manor respectively, with the same power, and in the same manner, as it would be our duty to act.

“The right of grazing cattle on the lower common is limited to copyholders actually residing within the manor; donkeys, swine, and geese, are excluded.

“If any persons other than copyholders wish to graze horses or cows on the lower common, application for that purpose may be made through you to us, and if granted, it will be on condition of a small weekly payment, which will be expended on draining, levelling, and improving the herbage of the common.

May 6.
Two persons, who had been appointed common-keepers in the manor of Wimbledon, appointed E. their deputy, by the following writing, signed by them:—“We, the undersigned, having been appointed common-keepers for the parish of Putney, hereby nominate and appoint you our deputy for the lower common, and authorize you to act for us in that behalf in all things pertaining to the rights and privileges of the lord, and the tenants of the manor, with the same powers and in the same manner as it would be our duty to act.” It then went on to state what were the rights of common, and in what manner the duties of common-keeper should be exercised:—*Held*, that this document did not require to be stamped,

as being a “grant or appointment of or to an office or employment,” within the 55 Geo. 3, c. 184, sched. pt. 1.

That title of the act applies only to offices to which a salary, fees, or emoluments, are annexed.

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"You will allow no dung, ashes, rubbish, sand, timber, or any thing else which may destroy the herbage, or injure the appearance of the common, to be deposited thereon.

"You will allow no nuisances to be committed, or encroachments made on the common now committed to your charge.

"W. CARMALT.

"W. WEBB CHAPMAN."

It was objected for the defendant, that this was a grant of "an office or employment," within the 55 Geo. 3, c. 184, sched. part 1, tit. "Grant or Appointment," and therefore required a stamp. The learned Judge overruled the objection, and a verdict was found for the defendant.

In this term, *Pearson* obtained a rule nisi for a new trial, on the above ground, against which—

Platt and *Gurney* now shewed cause.—This is not the grant of an office or employment, within the meaning of the Stamp Act. It is clear that the statute only imposes the tax on beneficial offices, to which a salary or emolument is annexed, because the amount of the stamp is graduated according to the amount of the "salary, fees, and emolument appertaining thereto." Here no salary or emolument of any kind is annexed to the defendant's duties. The common-keepers merely employ a servant to do on their behalf that which it is their duty to do, without any fee or salary annexed. [*Parke*, B.—Perhaps it may be said that this was an "instrument of procuration" within the act. In *Regina v. Kelk (a)*, the nomination of a proxy to vote in the election of a commissioner under a drainage act was held to require a stamp, as an instrument of procuration.] That was the case of a public office by

(a) 12 Ad. & E. 559; 4 P. & D. 185.

statute; and there the amount of the stamp does not depend upon the value of the employment, but on the length of the instrument. This is a mere matter of *direction* from the common-keepers to their agent or servant. The question is, whether he can be said to have held, by virtue of this instrument, a *distinct office* from that which they held who appointed him. Clearly not; he is merely to perform the duties of the office of common-keeper for them; and this document is merely for the purpose of informing him of the manner of performing them. In *Rex v. Inhabitants of Lew (a)*, it was held that the appointment of an assistant overseer required a stamp, on the ground that he was a distinct statutory officer, and not the mere servant of the overseers. It might as well be said, that the appointment of a broker to make a distress requires a stamp as this. [*Rolfe*, B.—In *Reg. v. Kelk*, it was an appointment of the party to act as the representative of the other; here it merely amounts to this—as we, the common-keepers, cannot be always on the spot, you, the defendant, are to act for us].

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Pearson, contra.—The act of Parliament says nothing directly as to any salary being necessary to bring the office within it; the words are, “Grant or appointment of or to any office or employment, by letters patent, deed, or other writing.” Surely this is either an office or an employment. Many officers are paid by honour, as the King’s almoner, mentioned by Lord Coke. [*Parke*, B.—Would the defendant have obtained a settlement by serving the office?] That is not precisely the question. [*Rolfe*, B.—Suppose two persons had been appointed, what must have been the stamp? Because, by the act, where such grant or appointment shall be made to two or more persons jointly, it is to be charged with a separate and distinct duty in respect of

(a) 8 B. & Cr. 655; 3 Man. & R. 369.

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each person, according to the amount of the salary, &c. appertaining to him.] Those provisions apply only to cases where the salary amounts to 50*l*. Where there is no salary at all, or none to that amount, the stamp of 2*l*. is to be imposed. [*Parke, B.*—This is no grant of an office; it is a mere authority to distrain. It is no more the grant of an office or employment than is an authority to a bailiff to execute a distress for rent. *Alderson, B.*—Throughout this head of the Stamp Act, the stamp varies with the amount of the salary or emolument, and, in case of the appointment of two persons, with distinct salaries, is imposed on each of them, plainly shewing that the intention was to impose the tax on salaried officers only, as well where the salary is under as above 50*l*. The grant of an office of honour is also within the act, under another title.] The case of *Rez v. Inhabitants of Lew* is an authority for the plaintiff.

PARKE, B.—An assistant overseer is a parliamentary officer, appointed by the magistrates, having a substantial office of his own, and performing all such duties as are authorized by the vestry. Here it is not sufficiently shewn that the plaintiff is a substantial officer, so as to require an appointment of him from the common-keepers to be on a stamp. He rather appears to be a mere servant of these persons, who give him an authority to distrain.

ALDERSON, B., and ROLFE, B., concurred.

Rule discharged.

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DOE *d.* GRIMSBY *v.* BALL, Assignee of JAMES BALL, an Insolvent Debtor.

May 9.

EJECTMENT for two houses.—At the trial before Lord Abinger, C. B., at the Middlesex Sittings after Hilary term, it appeared, that by deeds of lease and release, dated 28th and 29th of September, 1820, the insolvent Ball had conveyed the houses in question to one Surridge (through whose will the lessor of the plaintiff claimed), in consideration of 70*l.*, for which there was a receipt, signed by Ball, indorsed on the deed. In October 1821, Ball petitioned the Insolvent Debtors' Court for his discharge. The deeds were not registered until the 11th October, 1823. Surridge had never been in possession of the title-deeds. A rehearing of Ball's case took place in 1832 before the Insolvent Debtors' Court, on which occasion Surridge and Ball were examined; and on the following day, the former gave a bundle of keys to the defendant, the assignee, telling him to do what he pleased with the houses. Surridge died in April 1832. It was contended for the defendant, that these facts furnished evidence of the conveyance to Surridge having been fraudulent and void, within the stat. 13 Eliz. c. 5. The Lord Chief Baron thought, however, that there was no evidence thereof to go to the jury, and under his direction, a verdict was found for the plaintiff.

A conveyance of lands which is fraudulent and void against the creditors of the conveying party, within the 13 Eliz. c. 5, is void also as against his assignee on his insolvency, who represents the creditors; and the assignee may recover back the lands in ejectment.

Thesiger, in this term, obtained a rule nisi for a new trial, against which

W. H. Watson and *Pearson* now shewed cause.—Even if there was evidence of fraud, this defendant, the assignee of the insolvent, has no right to contest the deed on that ground. An assignee under the Insolvent Act which was in force at the time of the execution of this deed, (the

Exch. of Pleas, 1 Geo. 4, c. 119), took only what interest the insolvent
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himself was beneficially entitled to, and could not defeat a deed made by him, on the ground that it was fraudulent within the statute of Elizabeth. That act contained no provision making void any deed executed by the insolvent within a certain period before his imprisonment, or with the view of taking the benefit of the act. Nothing passed under it to the assignee but what the insolvent had, or what *he* had the right to impeach at law. No doubt the *creditors* might impeach the deed in equity, if fraudulent and void under the statute of Elizabeth. [*Parke, B.*—If it be void against the creditors, is it not so against the assignee, who represents them? According to your argument, the fraud is to be successful, or the creditors are to go into equity. The subsequent provision, in the 7 Geo. 4, c. 57, as to avoiding deeds executed by the insolvent within a certain time, refers not to deeds that are void against the creditors, but to deeds whereby a particular creditor is preferred. Could not assignees in *bankruptcy* avoid such a deed, and recover in ejectment?] A fraudulent conveyance is an act of bankruptcy in itself. [*Parke, B.*—A fraudulent transfer of goods by deed was not, until the 6 Geo. 4, c. 15, yet that is within the statute of Elizabeth.] The insolvent act gave the creditors no greater legal right than the insolvent himself had: and he clearly had no right to impeach such a deed. The creditors have therefore no locus standi at law, and must file their bill in equity.—They contended also that there was no evidence to go to the jury of fraud.

In the course of the argument, the following authorities were referred to: *Bac. Abr.*, tit. "Mortgage"; 2 *Cruise's Digest*, tit. "Mortgage"; *Hawes v. Leader* (a), *Butcher v. Harrison* (b), *Sims v. Thomas* (c), *Becke v.*

(a) *Cro. Jac.* 273. (b) 4 B. & Adol. 129; 1 Nev. & M. 677.

(c) 12 Ad. & E. 536; 4 P. & D. 233.

Smith (a), Knight v. Fergusson (b), Peacock v. Harris (c), and Thompson v. Jackson (d). *Exch. of Pleas, 1843.*

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Thesiger and Bramwell, in support of the rule, were not called upon to argue.

LORD ABINGER, C. B.—There must be a new trial. It is not necessary to give any opinion as to the law; but I think I ought to have left the question of fraud to the jury; the possession of the deed, and the delivery up of the keys to the defendant, were facts from which they might have inferred that the conveyance was fraudulent.

PARKE, B.—I am also of opinion that there ought to be a new trial in this case, on the ground that the question of fraud has not been left to the jury. I think, also, that the assignee of an insolvent debtor represents the creditors for all purposes, and if any fraud exists in a transaction to which the insolvent was a party, that the assignee may take advantage of it. A deed which is void as against creditors is void also as against those who represent creditors.

ALDERSON, B.—If a deed be void as against creditors, the assignees, who represent creditors, may avoid it.

ROLFE, B., concurred.

Rule absolute.

(a) 2 M. & W. 191.

Man. 854.

(b) 5 M. & W. 389.

(d) 4 Scott's N. R. 234; 3 Man.

(c) 5 Ad. & Ell. 449; 6 Nev. & G. 621.

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CHAPMAN and Another v. MORTON.

May 9.

The plaintiffs, merchants at Dieppe, sold to the defendant, a merchant at Wisbech, a quantity of oil-cake, which was delivered to the defendant there in Dec. 1841.

The defendant conceiving that the cargo did not answer the sample, landed a portion of it for the purpose of examination, and subsequently landed the whole, stored it in a public warehouse, and wrote to the plaintiffs, informing them that it lay there at their risk and costs, and requiring them to take it back: which the plaintiffs refused to do. After some correspondence, the defendant, in May, 1842, gave the plaintiffs notice that the cargo was lying at the warehouse at their disposal, and that if no directions were given by them, it would be

DEBT for goods sold and delivered, and on an account stated.—Pleas, as to part, payment into Court; as to the residue, a set-off for money by the defendant lent and advanced to, and paid, laid out, and expended for the plaintiffs, and for money had and received by the plaintiffs to the use of the defendant. At the trial before Lord *Abinger*, C. B., at the London sittings after Hilary Term, the following facts appeared:—

This action was brought by the plaintiffs, who are merchants at Dieppe, to recover from the defendant, a merchant at Wisbech, in Cambridgeshire, the sum of 428*l.* 5*s.* 7*d.*, the price of a quantity of Marseilles oil-cake, sold and delivered by the plaintiffs to the defendant. Against this claim the defendant sought to set off a sum of 652*l.* 15*s.* 4*d.*, being the balance of monies paid by him on the 12th of January, 1842, in discharge of certain bills of exchange amounting to 1570*l.* 17*s.* 6*d.*, which were drawn by the plaintiffs upon and accepted by the defendant's bankers on his behalf, on account of another cargo of oil-cake sold by the plaintiff to the defendant, and delivered to him at Wisbech in December, 1841. It appeared that the bills had been accepted and negotiated before the arrival of the oil-cake at Wisbech, and that on its arrival, the defendant made a complaint to the plaintiffs that it did not answer the sample; he however landed a part for the purpose of examining it, and considering that the bulk did not correspond with the sample, landed the whole, lodged it in the public granary at Lynn, and informed the plaintiffs, by letter dated the 24th of January, 1842, that it lay there

sold, and the proceeds applied in part payment of the defendant's damages. The plaintiffs answered that they considered the transaction at an end, and demanded payment of the price. The defendant thereupon offered the cargo for sale in his own name, and in July sold it in his own name to a third party:—

Held, that these facts sufficiently shewed an acceptance of the goods by the defendant, after which he could not treat the contract as rescinded; that he was not to be considered an agent of the plaintiffs from necessity, to dispose of the goods; and that he could not, in an action against him for another debt, set off money paid by him on bills which he had accepted on account of the disputed cargo before its arrival.

at their risk and costs, and required them to take it back; which, however, the plaintiffs refused to do. Some negotiation then took place between the parties, which went off, and ultimately, in the month of May, 1842, the defendant wrote to inform the plaintiffs that the oil-cake was lying at the public granaries at their disposal, and that if no directions were given by them, it would be disposed of by the defendant for the best price he could obtain, and the proceeds would be applied in part satisfaction of his damages. To this letter the plaintiffs replied, that they considered the transaction closed, and demanded payment of the price. In July following, the defendant advertised the cargo for sale in his own name, and it was subsequently sold by him, in his own name, to a third person.

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It was contended for the defendant, upon these facts, that he had sufficiently repudiated the contract, and that although he had sold the cargo, he must, under the circumstances, be taken to have sold it from necessity, as the agent of the plaintiffs, and was therefore entitled to set off in this action the price he had paid for it. It was answered for the plaintiffs, that inasmuch as the defendant had accepted the goods, it was too late for him then to repudiate the contract; and that no agency from the plaintiffs for the sale of the goods could be presumed, against their express disallowance of it. The Lord Chief Baron, being of this opinion, directed the jury to find a verdict for the plaintiffs, damages 428*l.* 5*s.* 7*d.*, giving the defendant leave to move to enter a verdict for him upon the issue on the plea of set-off.

Erle having obtained a rule accordingly,

Kelly, Hayes, and Willes now shewed cause.—There is no ground for admitting this set-off. It cannot be said that the defendant was the plaintiffs' agent from necessity to sell their goods. No authority for that purpose can be

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implied, in the face of the plaintiffs' express statement that they considered the transaction closed, and that they demanded payment of the price of their goods. There can be no room for any implication of such an authority, when the plaintiffs have distinctly refused to recognise the goods as being theirs, and insisted on the defendant's performing his contract. There are undoubtedly some cases in which such an authority has been implied in respect to articles of a perishable nature, pending a negotiation about the goods, and where there was no opportunity of apprising the owner of the circumstances or obtaining instructions from him; but none which at all apply to such a case as this, where the goods were not of a perishable nature, where the plaintiffs were at hand to receive communications from the defendant, and above all, where they distinctly refused to invest him with any such authority. The defendant dealt with the cargo as his own. He repudiates the contract in words, but adopts it by his acts. Could it possibly be said that he had authority to sell, as the agent of the plaintiffs, to a stranger on credit? If the bulk did not answer the sample, his course was to bring an action against the plaintiffs on their warranty. In *Cornwal v. Wilson (a)*, the plaintiff, a factor abroad, had exceeded the price limited by his principal, the defendant, for the purchase of certain goods; but the defendant, though he objected to the contract, having afterwards re-shipped and disposed of some of the cargo on a new risk, was ordered to account for the whole at the cost price. *Street v. Blay (b)* is a distinct authority, that if the purchaser of a specific chattel accepts it and deals with it, he cannot afterwards return it, or resist an action for the price, except in case of fraud, or of express agreement with or consent of the vendor. *Horncastle v. Farren (c)*, *Parker v. Palmer (d)*, and *Campbell v. Fleming (e)*, are authorities to

(a) 1 Ves. sen. 509.

(b) 2 B. & Adol. 456.

(c) 3 B. & Ald. 497.

(d) 4 B. & Ald. 387.

(e) 1 Ad. & Ell. 40; 3 Nev. & M. 834.

the same effect. *Hunt v. Silk* (a) is also an authority to shew that the buyer cannot rescind the contract of sale, unless the parties can be placed in the same position. Suppose, after the sale by the defendant, the goods had risen considerably in price; could the plaintiffs have sued him for selling *their* goods without their authority, in order to recover the difference? [Lord *Abinger*, C. B.—If the defendant made himself the plaintiffs' agent to sell, why did he not consult them as to the vendee, or the price, or sell in their name, in order that, if he should become insolvent, they might have a right of action against the vendee?] In truth, the case is just the same as if the plaintiffs had been upon the spot, repudiating the transaction. Having retained the goods which he obtained possession of as vendee, the defendant cannot afterwards renounce that character, and set himself up as agent of the vendor.

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Erle and Peacock, contra.—The question is, whether the contract of sale was rescinded; if it was, the defendant might have sued the plaintiffs for money had and received, and is equally entitled to set off in answer to this action the price which he has paid. [Lord *Abinger*, C. B.—Ought you not rather to say that the plaintiffs did not perform their contract, and that the property never passed to the defendant?] Either view of the case is sufficient for the defendant's case. For the purpose of the present argument, it is to be assumed that the goods were in fact not according to the sample. Now, the repudiation of the contract was complete on the 24th of January, and it cannot be said that, under the circumstances, the taking the cargo out for the mere purpose of examination constituted an acceptance, so as to prevent the right of repudiation. [Lord *Abinger*, C. B.—Even if that be so, it is clear the plaintiffs never intended the defendant to be their agent.]

(a) 5 East, 449.

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That is not a necessary part of the defendant's case. The property remaining in the plaintiffs, and the goods having been paid for by the defendant, he is entitled to set off the price. If they had been actually returned, that clearly would be so; here they could not be returned, but they remained in the public warehouse, where the plaintiffs might have retaken them, and, if any damage happened to them there, might have sued in trover or trespass. It is said, that by some subsequent act of the defendant, without communication with the plaintiffs, the property has been again transferred to him: but that cannot be. It is, in truth, altogether a question of fact whether there ever was really an acceptance by the defendant.

But further, this was the case of an agency of necessity. The term "perishable" is of a relative nature. Where the goods are suddenly perishable, an agency may be created instantane. Here they were gradually deteriorating in value and becoming perishable by lapse of time; and the plaintiffs were from time to time refusing the defendant's demand that they should take them back. Suppose the case of a live cargo, where the keep may in time exceed the value. [Lord *Abinger*, C. B.—If the vendee is selling on the vendor's account, he ought surely to give notice how, by whom, and on what terms. *Parke*, B.—He ought to make it unambiguous, so that if the sale were profitable he could not afterwards turn it to his own benefit. The question is, whether this was an action of adoption by the vendors, or a wrongful act of the defendant; and that is a question of fact.] The cases which have been referred to were quite different from this. In *Street v. Blay* there was a re-sale of the horse at a profit, without any objection having been previously made by the buyer. In *Parker v. Palmer* there was an attempt at an immediate re-sale, after an opportunity of examination. *Horncastle v. Farren* is subject to a similar observation. Here, from first to last, the defendant did no act to bring him within the

principle of those cases, and at last sold under a declaration that he sold on account of the plaintiffs. If the cargo had been sent back, the plaintiffs, being foreign merchants, would have had both the cargo and the price, not being amenable to the jurisdiction of the courts of this country. Under such circumstances, the defendant had a right to convert himself into an agent or factor for the plaintiffs to dispose of the cargo for his own protection, having a lien for his advances. All his acts are consistent with that character. The plaintiffs could not have sued him for not accepting the goods, if they were not according to the sample. What could he do but sell them? and being in this country, and the owners abroad, he could only sell in his own name. The letters would have been evidence against him of the plaintiffs' right to the proceeds.—They cited *Kemp v. Pryor* (a), and Paley on Principal and Agent, p. 28.

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Lord ABINGER, C. B.—I think this rule ought to be discharged. I was of opinion at the trial, and still think, that this case was a case of sale to the defendant, in which a set-off was out of the question; and therefore that I was warranted in the direction I gave to the jury. I think I could not have directed them that there was a sale by the defendant as agent for the plaintiffs. The utmost that could be said was, that it was an equivocal act, and we must therefore look to the whole of his conduct for an explanation of it. We must judge of men's intentions by their acts, and not by expressions in letters, which are contrary to their acts. If the defendant intended to renounce the contract, he ought to have given the plaintiffs distinct notice at once that he repudiated the goods, and that on such a day he should sell them by such a person, for the benefit of the plaintiffs. The plaintiffs could then

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have called upon the auctioneer for the proceeds of the sale. Instead of taking this course, the defendant has exposed himself to the imputation of playing fast and loose; declaring in his letters that he will not accept the goods, but at the same time preventing the plaintiffs from dealing with them as theirs. The safest conclusion, I think, for the jury to arrive at was, that the defendant, having once adopted the goods as his own, had no longer any power to repudiate them, and therefore retained no right of set-off against the price. With respect to the question of agency, I remember a case of foreign law, which occurred during the last war, that bears a strong analogy to the present. A shipment of goods was made from a port in Italy to Malta. At the time of their arrival the plague raged there, which made it dangerous to land them. The consignees accordingly sent the ship to Messina and there sold the cargo. The vendors having failed, and an action being brought by the owners of the goods against the consignees at Malta, the latter were held responsible, it being considered that the circumstances of the case did not make them agents of necessity to dispose of the cargo on behalf of the vendors.

PARKER, B.—I am of the same opinion. The case in truth resolves itself into a question of fact. If it were necessary to decide whether the case ought to have gone to the jury, for them to determine whether the defendant took the goods in performance of the contract, I should have thought it would have been right that they should decide that question. But, by the concession of the defendant's counsel, the Court is to say whether there was an acceptance by the defendant or not; and so looking at the case, I cannot differ from my Lord in the conclusion, that there was good evidence to shew that the defendant did accept the goods, and that he could not afterwards repudiate them, and treat the contract as having been rescinded,

and maintain an action to recover back the price. It appears that the goods arrived in the month of December, 1841; and, although there may be some doubt and ambiguity in the correspondence which followed between the parties, it seems to me, upon the whole, that there was no acceptance by the defendant down to the month of May. But the subsequent circumstances, of his offering to sell and selling the cargo in his own name, are very strong evidence of his taking to the goods, which will not deprive him of his cross-remedy for a breach of warranty, but whereby the property in the goods passed to him, which may be considered as having been again offered to him by the plaintiffs' letter in the month of May. It is said that this was an equivocal act, and that the defendant might have intended to sell the cargo as agent for the plaintiffs. But he could hardly say so, because the plaintiffs had already directly repudiated his acting as their agent for any such purpose. I admit that it was an equivocal act: there might be circumstances under which he might have disposed of the goods as the agent of the vendor; but it might be also that he meant to take to the property, having recourse to his cross-remedy. Upon the whole, I am not disposed to differ from my Lord Chief Baron, and think the rule ought to be discharged.

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ALDERSON, B.—I am of the same opinion. The whole case appears to me to be explicable only on the supposition that the defendant meant to take to the goods, and to get the proceeds of the sale in reduction of his damages for the alleged breach of warranty.

ROLFE, B., concurred.

Rule discharged.

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Where A. has an account against B., some of the items of which are more than six years old, and B. has a cross account against A., and they meet and go through both accounts, and a balance is struck in A.'s favour, this amounts to an agreement to set off B.'s claim against the earlier items of A.'s, out of which arises a new consideration for the payment of the balance; and takes the case out of the operation of the Statute of Limitations.

ASHBY v. JAMES.

DEBT for goods sold and delivered, and upon an account stated. Pleas, first, *nunquam indebitatus*: secondly, the Statute of Limitations.

At the trial, before the under-sheriff of Northamptonshire, it appeared that the greater part of the plaintiff's demand accrued more than six years before the commencement of the action, and that there were mutual accounts between the parties. The plaintiff tendered evidence, that, a short time before the action, he and the defendant met for the purpose of adjusting the accounts between them; that, on the plaintiff's demand being read over, the defendant said it was correct, but that he claimed a set-off; that his set-off was also investigated, and that, finally, a balance was struck in favour of the plaintiff of 12*l.* 9*s.* 6*d.* This evidence was objected to on the part of the defendant, on the ground that it amounted to a mere parol acknowledgment by him of the debt, which, by the express provisions of the 9 Geo. 4, c. 14, was not sufficient to take the case out of the statute. The under-sheriff, however, received the evidence, and the plaintiff had a verdict for 12*l.* 9*s.* 6*d.*

Humfrey having obtained a rule for a new trial, on the ground that this evidence was improperly received,

Barstow now shewed cause.—The evidence was rightly received. Here there was not merely a promise to pay the pre-existing debt, but an act done between the parties, out of which a new consideration arose, namely, a settlement of accounts, and the striking of a balance as to items within as well as beyond the six years, which was sufficient to take the case out of the operation of Lord *Tenterden's* act.

Humfrey, contra.—No mere verbal statement of accounts is now sufficient to take the case out of the Statute of Limitations; there must be an acknowledgment or promise in writing. *Jones v. Ryder* (a) is expressly in point. It was there held, that a parol statement of account between the parties as to a debt previously ascertained is not sufficient to take the case out of the statute. *Smith v. Forty* (b), in which an account stated within the six years, of a debt which accrued before that time, was held to be sufficient for that purpose, was in effect overruled by *Jones v. Ryder*. The same principle is recognised in *Mills v. Fowkes* (c).

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LORD ABINGER, C. B.—This rule must be discharged. I think Lord *Tenterden's* act does not apply at all to the fact of an account stated, where there are items on both sides. [His Lordship read the first section of the 9 Geo. 4, c. 14]. This is not “an acknowledgment or promise by words only;” it is a transaction between the parties, whereby they agree to the appropriation of items on the one side, item by item, to the satisfaction pro tanto of the account on the other side. The act never intended to prevent parties from making such an appropriation.

ALDERSON, B.—I am of the same opinion. The Courts have never laid it down that an actual statement of a mutual account will not take the case out of the Statute of Limitations. They have indeed determined, that a mere parol statement of, and promise to pay, an existing debt, will not have that effect, because to hold otherwise would be to repeal the statute. The truth is, that the going through an account, with items on both sides, and striking a balance, converts the *set-off* into *payments*; the going through an account where there are items on one side

(a) 4 M. & W. 32.

(b) 4 C. & P. 126.

(c) 5 Bing. N. C. 455; 7 Scott,
444.

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only, as was the case in *Smith v. Forty*, does not alter the situation of the parties at all, or constitute any new consideration. Here the striking of a balance between the parties is evidence of an agreement that the items of the defendant's account shall be set off against the earlier items of the plaintiff's, leaving the case unaffected either by the Statute of Limitations or the set-off.

ROLFE, B.—An actual settlement of accounts is not an “acknowledgment or promise by words only.” It is a transaction between the parties, out of which a new consideration arises for a promise to pay the balance.

Rule discharged.



GARVEN, Assignee of JONES, a Bankrupt, v. BIRCH and
Another (a).

May 11.

Where a plaintiff abstains from trying the cause at the assizes for which he has given notice of trial, in consequence of a proposal from the defendant that it shall await the event of another action against the defendant, and that is determined in time to enable the plaintiff to go to trial at the next assizes; his not doing so is a default, which entitles the defendant to move for judgment as in case of a nonsuit, and he is not bound to take the cause down by proviso.

COWLING shewed cause against a rule for judgment as in case of a nonsuit. Issue was joined in August 1841, and notice of trial given for the Liverpool Summer Assizes. The cause was not then tried, in consequence of a proposal made by the defendants' attorney to the plaintiff's, that they should first see the event of another action brought by one Harris against the same defendants (b). That case was finally determined in Hilary Vacation 1842. This cause had not since been taken down to trial. *Cowling* urged, that as the non-trial of the cause arose from the

(a) Before *Parke, B.*, sitting alone. (b) *Harris v. Birch*, 9 M. & W. 591.

act of the defendants, there was no neglect or default within the statute, and the defendants' remedy was by bringing down the case by proviso; and cited *Jenkins v. Charity* (a), But

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PARKE, B. was of opinion, that though the not proceeding to trial at the first assizes was sufficiently excused, yet the plaintiff's not going to trial at a subsequent assizes was a default for which the defendants had a right to move, and therefore the plaintiff must give a peremptory undertaking.

Rule discharged accordingly.

Crompton appeared in support of the rule.

(a) 2 Dowl. P. C. 197.

NICHOLSON and Another, Assignees of MARSHALL,
a Bankrupt, v. DYSON.

May 10.

CASE.—The declaration contained two counts, charging the defendant with negligence as the attorney of the bankrupt, before his bankruptcy, in respect of two contracts made by the bankrupt for the purchase of certain leasehold premises, and in preparing and completing the conveyances thereof. The declaration alleged that the defendant had accepted a defective title, setting out the defects of title specially. The defendant pleaded not guilty to the whole declaration, and also a plea denying the bankruptcy. He further pleaded eleven pleas to the first count of the declaration, the last thereof being a plea of the Statute of

When a defendant pleads the general issue, and several special pleas which are involved in the general issue, and the defendant succeeds on the general issue, but the special pleas are found for the plaintiff, the general issue is to be construed distributively for the purpose of the taxation of costs; and the defendant is not to be allowed the costs on so much of the general issue as is involved in the special pleas found for the plaintiff, but such last-mentioned costs are to be allowed to the plaintiff.

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Limitations, and ten pleas to the second count of the declaration. Several of the pleas were traverses of the specific defects of title alleged in the declaration, and one of the pleas to each count alleged that the defendant, before the completion of the purchase, fully explained the defects of title to the bankrupt.

At the trial, a verdict was taken for the plaintiffs, subject to a reference, in the usual terms as to costs. By his award, the arbitrator directed the verdict to be entered for the defendant on the issue joined on the plea of not guilty, and also on the issue joined on the replication to the plea of the Statute of Limitations pleaded to the first count; and on the remaining twenty-two issues he directed the verdict to be entered for the plaintiffs. On the taxation of costs, the Master refused to allow to the defendant the costs of any of his witnesses but one, on the ground that they were witnesses to those facts only which were put in issue by the several pleas which were found for the plaintiffs.

Kelly had obtained a rule calling on the plaintiffs to shew cause why the Master should not review his taxation, on the ground that the matters put in issue by the special pleas were in fact also put in issue by the plea of not guilty; and also that the Master was mistaken in determining that the evidence of some of the witnesses was applicable solely to the issues found for the plaintiffs.

Thesiger and *Hugh Hill* shewed cause.—The difficulty in this case is occasioned by the form of the pleadings, the defendant having pleaded so many pleas which were in reality but so many parts of the general issue. The general rule is well settled (a); the question is only as to its application in the present instance. If the defendant had

(a) See *Knight v. Woore*, 3 *Crowther v. Elwell*, 4 M. & W. 71; Bing. N. C. 534; 4 Scott, 360; *Haslewood v. Back*, 9 M. & W. 1.

not pleaded the special pleas, there could be no doubt that the defendant would have been entitled to the costs of all the witnesses called to speak to any fact put in issue by the plea of not guilty, because he would have been the successful party on that plea. The fallacy lies in supposing that he has succeeded on that plea to its full extent, for he has not succeeded on such parts thereof as are involved in the special pleas. The issue raised by the plea of not guilty must therefore be construed distributively; on those parts contained in the special pleas the plaintiffs have succeeded, and on the residue only has the defence been successful; therefore the defendant is entitled only to the costs relating to such residue. *Daniels v. Barry* (a) is in point. There, in case for a deceitful representation upon the sale of a ship, in falsely representing her to be fit, whereas she was not fit, as the defendants well knew, the defendants pleaded, first, not guilty: secondly, a traverse of the allegation in the declaration as to unfitness: the jury found that the vessel was unfit, but that the defendants did not know it to be so: and the verdict was entered for the defendants on the first issue, and for the plaintiffs on the second; and it was held that the Master was right in allowing to the plaintiffs the costs of their witnesses upon the issue as to the unfitness, and refusing to allow the defendants the costs of their witnesses called to prove the fitness, as they had raised a distinct issue as to the fitness of the vessel, though that would have been involved under the general issue. And the same principle is sanctioned by *Doe v. Errington* (b), *Prudhomme v. Fraser* (c), and *Routledge v. Abbott* (d). With respect to the other ground, the Master is the proper person to determine the fact as to what issues the witnesses were called to prove.

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- (a) Law Journ. Rep. (N. S.) M. 512.
vol. 12, Q. B., 113. (d) 8 Ad. & Ell. 592; 3 Nev.
(b) 4 Dowl. P. C. 602. & P. 560.
(c) 2 Ad. & Ell. 645; 4 Nev. &

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[*Alderson, B.*—We have spoken to the Master, and he has informed us that he apprehends he was misinformed by the parties who attended the taxation, as to the particular facts which the witnesses were called to speak to.]

Kelly, *contrà*, was not called on.

PARKE, B.—It would be more satisfactory, in consequence of what the Master has stated to us, that this taxation should be reviewed. The Master is to allow costs to the defendant on so much of the general issue as the witnesses on his part were called to prove, and on which he succeeded, but he is not to allow to the defendant the costs of so much of the general issue as is involved in the special pleas found for the plaintiffs. The last-mentioned costs are to be allowed to them.

ALDERSON, B.—The rule is this. With respect to the costs of the witnesses, which are applicable solely to issues found for the plaintiffs, they are entitled to costs; where such costs are applicable to issues on which the defendant has succeeded, he is entitled to costs. Upon so much of the general issue as is contained in the special pleas, the defendant has failed, and the plaintiffs have succeeded, therefore the defendant is not entitled to the costs relating thereto. The Master should treat the general issue as distributive.

ROLFE, B., concurred.

Rule absolute.

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SMITH v. BOND.

May 10.

THIS was an action brought against the defendant upon the stat. 9 Ann. c. 14, s. 2, to recover from him money won at play, from different persons mentioned in the several counts of the declaration, and also the treble value thereof. The first count of the declaration stated, that A. B., in the parish of St. George, Hanover-square, in the county of Middlesex, by playing with the defendant at dice, at a certain game called French hazard, lost to the defendant, at one sitting, contrary to the statute, and the defendant won of the said A. B., the sum of £207; which said sum of money the said A. B. then and there paid to and the same was then and there received by the defendant; whereby, and by force of the said statute, an action had accrued to the plaintiff, who sued for himself and the poor of the said parish of St. George, Hanover-square, to receive of the defendant the said sum of money so lost, and the treble value thereof. The other counts varied only in the names of the persons who were stated to have lost the money.

Plea, nil debet by statute.

At the trial before Lord *Abinger*, C. B., at the Middlesex sittings after last Michaelmas Term, it was proved that A. B. lost, at a gaming-table kept by the defendant, in the parish of St. George, Hanover-square, the sum of £207, of which he paid down £7 in cash, and gave a blank cheque for the remainder, which, on the following morning, he exchanged for a printed cheque on Messrs. Smith, Payne, & Co., and it was paid by them at their bank in the city. The losses to which the other counts (except the second) related were also, wholly or in part, paid by cheques, which were cashed out of the parish of St. George, Hanover-square. It was thereupon contended for the defendant, that inasmuch as the action was brought by the plaintiff for himself and the poor of St. George, Hanover-square,

Where a person loses money by gaming, to the amount of £10 and more, and pays it by a cheque on a banker, which is cashed by the banker on a subsequent day and in a different parish; the offence prohibited by the 9 Ann. c. 14, s. 2, is committed at the place where the money is lost and won, and not at that where the cheque is cashed, and therefore an action under that section by a common informer, for the sum lost and the treble value, is properly brought on behalf of the poor of the parish in which the play took place.

Such a transaction is substantially a gaming for ready money, and not a gaming on credit.

Semble, however, that the 9 Ann. c. 14, s. 2, is not confined to a gaming for ready money only.

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and the payments (which, it was alleged, constituted or at least completed the offence) were made in other parishes, the action could not be maintained. The Lord Chief Baron overruled the objection, and a verdict was found for the plaintiff on the first, second, fourth, sixth, and ninth counts of the declaration, and for the defendant on the others.

In Hilary Term, the *Solicitor-General*, for the defendant, obtained a rule to shew cause why the verdict should not be confined to the second count of the declaration, or why a new trial should not be had:—first, on the objection taken at the trial; and secondly, on the ground that the gaming in question (excepting that which was the subject of the second count) was a gaming *on credit*, and therefore the action ought to have been brought on the stat. 16 Car. 2, c. 7, which prohibits all gaming on credit, or on the 13 Geo. 2, c. 19, or 18 Geo. 2, c. 34.

In the present term (April 27),

Thesiger, Kelly, and Lush shewed cause.—Neither of the objections taken on the part of the defendant can be maintained. First, admitting that the transactions in question amounted to a gaming on credit, and that the statutes on which the defendant relies apply to this case, still the penalty may be cumulative; and the statute of Anne, which includes not merely ready-money transactions only, but *all* cases where more than £10 is lost at one sitting, may also apply. The 2nd section speaks in terms of the payment or delivery of the sum of £10, “or any part thereof.” Neither is the 13 Geo. 2, c. 19 (which prohibits games with dice, except backgammon), or the 18 Geo. 2, c. 34, s. 8 (which subjects persons winning or losing £10 at play, at any one time, to indictment and fine), at all inconsistent with the 9 Ann. c. 14, s. 2. The remedies are cumulative. If any other construction were adopted, parties might play for any sum, and altogether evade the penalties of the act by making their payments in extra-

parochial places, or postponing them for a single day. There would always be an arrangement of that kind. The statute does not say "and shall *then and there* pay and deliver" &c. But, in truth, this gaming *was* for ready money, and not on credit. A gaming *on credit* is where the parties play on a previous understanding that the money is not to be paid immediately: not where part is paid at the time, and the payment of the remainder is merely deferred.

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The other objection is, that, as the second section of the statute of Anne gives the penalty for the use of "the poor of the parish where the offence shall be committed," and the payment, and not the losing of the money, constitutes the offence, the action ought to have been brought for the poor of the parish where the money was paid, not where it was lost. Now, it is true that, unless payment be made of the money lost at play, the offence is not complete; because the statute is directed against persons who shall, by playing or betting, lose in the whole the sum or value of £10, "*and shall pay or deliver the same or any part thereof*" &c.: but nevertheless, the payment does not constitute the offence: it is the *gaming* against which the penalties of the act are directed. The payment is a condition precedent to the attaching of the penalty, but it is no part of the offence. The case of *usury*, on which reliance will be placed on the other side, is quite distinguishable. The stat. 12 Ann. stat. 2, c. 16, after prohibiting any person from taking for the loan of monies above £5 per cent. per annum, and declaring all contracts for greater interest void, enacts, that all persons "who shall upon any contract *take, accept, and receive*, by way of any corrupt bargain, loan," &c. above £5 per cent. per annum, shall forfeit treble value. Here, therefore, the *taking and receiving* the usurious interest, not the contract under which it is taken, constitutes the offence whereby the forfeiture is incurred; and therefore it was rightly held, that where the usurious contract was made in one county, but the

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money was paid and received in another, the venue must be laid in the latter county. *Pearson v. M'Gouran* (a). There the "taking and receiving" is the whole body of the offence; here the winning of the money is the criminal act, and is of itself an indictable offence: the payment is an act done by the other party, who is to take advantage of the winning. And in sect. 5, the winning is expressly stated to be the offence contemplated by sect. 2. It is directed against fraudulent winning, and then enacts that every person "so winning &c. as aforesaid, or winning at any time or sitting above the said sum or value of £10, and being convicted of any of the said offences," on indictment or information, shall forfeit &c. &c. But, even if this be otherwise, yet, by analogy to the case of *Scott v. Brest* (b), the penalty might be sued for on behalf of the poor of either parish. There the question arose, in which of two counties the offence of usury was committed; and *Ashhurst, J.*, says: "Even supposing the foundation of this action to have arisen in two counties, I think that, where there are two facts which are necessary to constitute the offence, the plaintiff may, ex necessitate, lay the venue in either, according to the case cited (c)." So, in *Rex v. Burdett* (d), it was held that a party may be indicted for libel, either in the county where he composes with intent to publish, or in that where he actually publishes, the libel; and the rule as to penal actions is the same as in misdemeanours. But further, according to the case of *Frederick v. Lookup* (e), it would seem to be unnecessary to shew in the declaration that the parish in which the offence took place is that for the poor of which the plaintiff sues. There the declaration stated, that the plaintiff sued as well for himself as for the poor of the parish of St. Paul, Covent

(a) 3 B. & Cr. 700; 5 D. & R. see also Com. Dig. Action (11).

616.

(d) 4 B. & Ald. 95.

(b) 2 T. R. 241.

(e) 4 Burr. 2018.

(c) *Bulwer's case*, 7 Rep. 1;

Garden; and alleged the gaming to have been "on the 11th day of March, 1757, at *Westminster* aforesaid:" and, upon writ of error brought, after verdict and judgment for the plaintiff, one of the errors assigned being, that it did not appear from the declaration that the offence was committed in the parish of St. Paul, Covent Garden, so as to give the poor of that parish a right to the money when recovered, the answer given to the objection was, that after verdict it must be taken that the offence was proved to have been committed in the proper parish: and the judgment was affirmed so far as related to the recovery of the *debt*, although on another ground it was reversed as to the damages and costs. It is immaterial, therefore, whether any, or what, parish is stated in the declaration. The statute does not say that the poor of the parish are to be co-plaintiffs, or to associate in the action, nor is the question as to the parish at all involved in the issue: the application of the money is a question between the plaintiff and the parish after the judgment is recovered. The plea here is merely that the defendant does not owe the money "to the plaintiff or the poor of the said parish, or either of them:" the latter part of the traverse is immaterial. What parish may come in to claim the moiety is not a matter included in the issue.

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The *Solicitor-General*, *Platt*, and *Butt*, in support of the rule.—Three distinct questions arise in this case: first, whether the declaration properly describes the poor who are to receive the moiety of the penalties recovered; secondly, whether this was a gaming on credit, or payment was made at the time, so as to be within the 9 Ann. c. 14, s. 2; and lastly, if payment was not made at the time, whether the offence prohibited thereby is complete until payment *be* made. First, the action is improperly laid: the payment of the money having been made within a parish in the city of London, the action ought to have

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been brought on behalf of the poor of that parish, and not for the benefit of the poor of St. George, Hanover-square. And this is laid down in all the books to be matter of substance: Chitty on Pleading, 276; *Clark v. Taylor* (a), *Taylor v. Willans* (b). The case of *Frederick v. Lookup* has been cited to shew that this allegation is immaterial after verdict; but on what ground the judgment of the Court was given does not appear from the report.

Secondly, this was not a case in which payment was made at the time. The cheque is a mere security for money to be afterwards paid. The defendant might, indeed, have been made liable on another section of the act. [*Rolfe, B.*—He might on sect. 5; *Applegarth v. Colley* (c)]. Or the plaintiff might have proceeded under the 16 Car. 2, c. 7. The question is not whether this offence be punishable, but whether the plaintiff has pursued the right remedy. In *Scurry v. Freeman* (d) it was expressly held, that if a draft on a banker be given for usurious interest, and a receipt taken for it in county A., and the draft be afterwards exchanged for money in county B., the usury is committed in the latter county, and the venue must accordingly be laid there, because the draft is merely a promise to pay. No doubt the words of the statute against usury are, “shall upon any contract take, accept, and receive,” &c. &c.; but here also, it is submitted, no complete offence is committed until the receipt of the money. The same inconvenience and evasion of the law might take place in the case of usury as has been supposed in this case. The dictum that the action may be laid in either place is not correct in law: *Scurry v. Freeman* and *Pearson v. M'Gowan* are authorities to the contrary. [*Rolfe, B.*—In the case of usury, two acts are necessary to make it an offence,—the corrupt contract, and the receipt of the excessive interest;

(a) 3 Esp. 218.

(b) 3 Bing. 449; 11 Moore, 448.

(c) 10 M. & W. 723.

(d) 2 Bos. & P. 381.

but here the winning is of itself an offence.] That is the third question, what is the proper construction of the statute in that respect. *The offence* here must mean the offence created by this particular clause. If that be the losing and winning of the money, then, under the stat. 31 Eliz. c. 5, if there were no payment of the money for a year, no action at all could be had. Surely the period of limitation must run from the time of the payment, and the party cannot get rid of his liability by withholding payment for a time. Gaming was no offence at common law, nor until the statute of Anne, if the money were paid at the time: the gaming, therefore, which is therein considered as the offence, is the gaming thereby prohibited, viz. the losing money *and paying it* at the time. *Bones v. Booth (a)*. In *Rawdon v. Shadwell (b)*, the defendant won of the plaintiff £500 at backgammon, for which the plaintiff some time afterwards gave him a bond, and subsequently paid part of the money secured thereby; and, on a bill filed to be relieved against the bond, and to be re-paid the money, Lord *Hardwicke* decreed accordingly, saying "that, by the stat. 9 Anne, all securities for money won at play are made void, consequently the payment under such security cannot be supported; that the time limited by that statute for suing, or the recovery of money paid, means money actually paid at the time it is lost, and does not extend to securities." The offence intended to be prohibited, both in this statute and in the statutes against usury, is the *obtaining another man's money* on such an illegal contract. If the money lost be not paid, the mischief and ruin which the statute was intended to prevent do not occur.

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Cur. adv. vult.

The judgment of the Court was now delivered by

(a) 2 W. Bla. 1226.

(b) Ambl. 269.

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LORD ABINGER, C. B.—This was a rule to shew cause why the verdict obtained against the defendant, in a *quasi tam* action brought on the stat. 9 Ann. c. 14, should not be confined to the second count in the declaration, on which count it was proved, that the payment of money lost was made at the time and place of play; and that the verdict should be set aside as to the other counts, where it appeared upon the evidence that the payment had been made at a subsequent day, and in a different parish. We have considered the case, and have come to the conclusive opinion, that the rule ought to be discharged.

One objection was, that the statute which gave the penalty, required a payment to be made before any action could be brought for the penalty; and it was plausibly contended, especially by analogy to the Statute of Usury, that the penalty became due upon the fact of payment, and that the place of payment was the place or parish within which the offence was committed, and was therefore the place or parish to the poor of which, in conjunction with the common informer, the penalty was given by the act of Parliament. It therefore became a question where the offence was committed; whether it was committed at the time or place of play, or at the time or place of payment; the words of the statute being, “where the offence was committed.” It becomes material, therefore, to consider what *was* the offence, in order to ascertain the place where it was committed. If the offence consisted in the receiving of the money, and if that was intended to be a specific offence by the second section of the statute of Anne, then the argument for the defendant must prevail. But when we look at this statute, and the preceding one of 16 Car. 2, c. 7, it appears clear that the payment of the money is not the offence contemplated by this act of Parliament. The offence to be discouraged was the offence of *excessive gaming*; and as gaming cannot be practised by one person, the offence prohibited must be that offence

committed by two persons at the least; and therefore it must be an offence committed in the place where the two persons play. The stat. 16 Car. 2, c. 7, shews clearly what the legislature originally intended to discountenance. The preamble of that statute states, "Whereas all lawful games and exercises should not be otherwise used than as innocent and moderate recreations, and not as constant trades and callings, to gain a living, or make unlawful advantage thereby; and whereas, by the immoderate use of them, many mischiefs and inconveniences do arise, and are daily found, to the maintaining and encouraging of sundry idle, loose, and disorderly persons, and in their dishonest, lewd, and dissolute course of life, and to the circumventing, deceiving, consuming, and debauching of many of the younger sort, both of the nobility, and gentry, and others, to the loss of their precious time, and the utter ruin of their estates and fortunes, and withdrawing them from noble and laudable employments and exercises; be it therefore enacted," &c. Here is the declaration of the legislature, that excessive gambling is a mischief that ought to be discouraged; and undoubtedly that act embraces not only deceitful gaming, but excessive gaming also. It imposes, by the second section, a penalty on deceitful gaming. Then excessive gaming is the subject of the prohibition of the third section: and there it appears to describe immoderate gaming as that which takes place on credit, where more than £100 is lost at play. We now come to the 9 Ann. c. 14. That act begins by reciting, that the laws for the prevention of gaming "have not been found sufficient for that purpose." Now this act also was intended to prevent both excessive and deceitful gaming, and it embraces both the objects of the former act. The first section makes void all securities given for gambling debts, of whatever amount; bonds, bills, notes, or mortgages; with this distinction as to mortgages, that when a mortgage is given for the payment of a gaming debt, the mortgage shall not be for

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the benefit of the mortgagee, but shall be for the benefit of the person who would be entitled to the estate if the mortgagor had been dead; so that the estate upon which the mortgagee has advanced the security is still left liable to the incumbrance, but the party for whom the incumbrance is created is not entitled to receive it, the party entitled being the individual to whom the estate would fall if the mortgagor were dead, that is, the next in remainder or succession. Now this first clause does not define the offence; it is only intended to frustrate any advantage that might be gained by such gaming, and declares in effect, that a party shall not have any action to recover a debt which is a security for, and has been the result of, gaming. We now come to the second section, on which the present action is brought, and which defines what excessive gaming is. The excessive gaming of the statute of Charles II. was gaming on credit for more than £100. By this section excessive gaming is defined to be, "where any two or more persons shall at any time or sitting, by playing at cards, dice, tables, or other game or games whatsoever, or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any one or more person or persons so playing or betting, in the whole, the sum *or value* of £10." But this section, while defining what excessive gaming is, does not create any specific offence; it only provides a remedy, to prevent a party who has committed the offence from getting anything by it; and therefore it gives to the party losing, and paying the money, an action to recover it back; and if he does not take that step, it gives to the common informer a right to recover it, and also the treble value for himself and for the benefit of the poor of the parish "where *the offence* is committed." What then is the offence? The offence is not defined by that clause, which only provides the particular remedy for a particular case in which the offence has been committed: but it is afterwards prohibited in the strongest terms in

the fifth section, which also embraces both the offences of deceitful gaming and excessive gaming, and places them in the same category. It adverts to the offence of excessive gaming mentioned in the second section, and makes all persons who shall *win* at any time more than £10, either in money or goods, liable to information. The offence, therefore, prohibited by the fifth section is that of *excessive winning* by gaming; and I think we must construe the words of the second section to mean the same offence that is specified in the fifth, and the same offence which, although not so strictly defined by this as by the former statute, is yet prohibited by it. Now, that offence was committed in the place where the two persons gamed together, and not where one of them paid the money. Upon these grounds, we think the argument fails in supposing the offence to be confined to the place where the money was received.

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With respect to the Statute of Usury, that stands altogether upon a different ground. There the offence prohibited, and on which the penalty is given, is the *taking and receiving* more than £5 per cent. as lawful interest. If a usurious contract were made, and nothing were done upon it, there would be no offence under the statute, no indictment, and no action. The contract would have been void, but no offence would have been committed which was punishable under the statute. There, the offence consisting in the taking of the money, it is plain that the venue is limited to the place where the money is taken. We think, therefore, that the Statute of Usury does not bear the analogy it is supposed to bear to the present case.

Another objection was made, which struck several of the Court, and myself in particular, as very plausible, and for which was quoted the authority of Lord *Hardwicke*, in the case of *Rawdon v. Shadwell*, in which that learned Judge was supposed to have said, that this second section appears to have reference only to the playing for ready

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money, and that therefore no other money could be recovered under that section, but what was lost and paid at the time and place of playing. But, even if this reasoning were just, it would fairly let in the argument urged by Mr. *Kelly*, that the playing for ready money must be in contradistinction to a playing for credit, and that a playing for credit must be a playing on a *previous contract* that credit was to be given for the sum lost or won. That is not the present case, because the credit in the present case was merely the result of accident, and not of any previous contract between the parties: substantially it was a playing for ready money, and the money was lost by such playing, although the party, not having the ready money at hand, gives a security to pay on the next day. However, without pursuing that argument further, it appears to us, on consideration of the words of the statute, that it is impossible for Lord *Hardwicke's* opinion to be maintained. The statute is not confined to *money* lost, but extends to money or other things, and it gives the remedy by action, not only for money had and received for the money lost, but also of trover for goods lost. Now it appears a very violent construction to suppose that the act was intended to apply only to goods that a party might have about his person at a gambling house. Why should it not apply to horses, or wine, or any other commodity not of a portable nature, and which therefore could not be delivered until the following day at least? It appears to me that it would be a very rigorous, and by no means a justifiable, construction of the act, to confine it to either money or goods payable presently at the time and place of play. If it is not applicable to *goods* lost and delivered at the time and place, why should it apply to *money* lost at the time and place? Under these circumstances, we are of opinion that this branch of the argument also fails. We do not see any reason, from the nature of things, and the policy of such an act of Parliament, why

the remedy given to recover the money back should not as much apply to money paid on a note, or a banker's cheque, as to money paid at the time of play. It depends on the strict construction of the statute, and applying that strict construction, we think that the argument cannot be sustained, and therefore that the rule must be discharged.

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Rule discharged.

WROUGHTON v. TURTLE.

May 10.

COVENANT on an indenture of mortgage, to recover the sum of £500 and interest. Plea, non est factum; with several special pleas, on which nothing ultimately turned.

At the trial before Lord *Denman*, C. J., at the last Spring Assizes at Maidstone, the deed was produced in evidence, and was an assignment by the defendant to the plaintiff, in consideration of £500, of certain leasehold premises for the residue of the term, subject to a proviso for redemption on payment of the said sum of £500 and interest. It appeared from the recitals contained in it, that the original lease was for the term of ninety-nine years, if three persons therein named, or any of them, should so long live, and the lease contained a covenant from the lessor to renew the lease at the costs of the lessee, on the death of any one of the existing lives, upon payment of the sum of £60 for a fine. And the indenture of mortgage contained a covenant, that in case of the death of any of the nominees mentioned in the indenture of lease, whilst the principal sum of £500 and interest remained due, he the said William Turtle (the

Where a mortgage of certain leasehold premises, subject to a proviso for redemption on payment of the principal money and interest, contained covenants by the lessee (the mortgagor), to procure, at his own costs, renewals of the lease (under the power contained in the original lease), and in case the mortgagor refused or neglected to do so, then it should be lawful for the mortgagee to procure such renewals; and a covenant that all the fines, costs, and expenses of the mortgagee in procuring such renewals,

should be a charge on the mortgaged premises, and the same should not be redeemed or redeemable until payment of such costs, charges, and expenses:—*Held*, that an ad valorem stamp of £4 was sufficient, and that the deed did not require a stamp of £25, as being a security for the repayment of money to be thereafter advanced or paid, the amount of which was uncertain and without limit.

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defendant) should and would, as often as any death should happen, at his own costs and charges, renew the said lease, and insert such life or lives as the said P. Wroughton (the plaintiff) should nominate; and for that purpose he the said W. Turtle should join and concur with the said P. Wroughton in all lawful and necessary acts, by surrender or otherwise, for procuring a renewal of the subsisting lease for the time being of the premises; and in case the said W. Turtle, after notice to him as therein mentioned, should refuse, decline, or neglect to join or concur therein, it should be lawful for the said P. Wroughton, his executors, &c., at his or their sole discretion and authority, by surrender, assignment, or other disposition of the subsisting interest in the aforesaid premises, or otherwise, to obtain or procure a renewal or renewals from time to time of the subsisting lease of the said premises, subject to the subsisting right, title, and equity of redemption of the said W. Turtle, his executors, administrators, and assigns. And it was thereby further covenanted "that all the fines, fees, costs, charges, and expenses of the said P. Wroughton, his executors, &c., in or about the procuring or obtaining any such renewal or renewals as aforesaid, should be a charge on the aforesaid premises thereby assigned, together with interest for the same after the rate of £5 per cent. per annum from the time or respective times of the payment of such costs, charges, and expenses respectively; and the aforesaid premises should not be redeemed or redeemable until payment by the said W. Turtle, his heirs, executors, administrators, or assigns, unto the said P. Wroughton, his executors, &c. of the amount of such costs, charges, and expenses, and the interest for the same, as well as the said sum of £500 hereby secured, and the interest for the same, in manner aforesaid."

The stamp on the above deed was £4. It was objected, on its being read, that it was a security for money to be thereafter advanced, the amount of which was uncertain

and without limit, and therefore required a stamp of £25, without which it was inadmissible. The learned Judge, however, was of opinion that the stamp was sufficient, and the plaintiff obtained a verdict for £500 and interest, leave being reserved to the defendant to move to enter a non-suit, if this Court should be of opinion that the stamp was insufficient.

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Peacock having, in the early part of this term, obtained a rule accordingly,

Butt shewed cause (*Platt* and *Thesiger* with him).—The stamp on the deed, being the ad valorem duty on the 500*l.* advanced, was sufficient. It will be said, however, on the other side, that there being a provision in the deed, that in case of the mortgagor's refusing or neglecting to procure renewals of the lease, the mortgagee might himself procure the renewal, and that the fines and costs of the mortgagor in procuring the renewals should be a charge on the mortgaged premises, the mortgage deed became a security for money to be thereafter advanced or paid, the amount of which was "uncertain and without limit," and therefore, according to the schedule to the Stamp Act, 55 Geo. 3, c. 184, required a stamp of £25. But the words of the schedule in the act, as to money "to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due," apply only to cases where the money is to be advanced or paid by the mortgagee to the mortgagor, and would, when advanced, become part of the principal sum, for which an action of debt would lie; and in those cases, where the sum is "uncertain and without limit," a stamp of £25 is imposed. [*Parke*, B.—The covenant says that the fines, fees, and expenses of procuring the renewals shall be a charge on the mortgaged premises.] That is merely a power to incur certain costs, which are to become a charge

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on the property, which is very different from a debt due for money lent, advanced, or paid. *Doe d. Jarman v. Larder* (a) is in point. There the sum of £130 was advanced on mortgage of a term of years determinable on lives, with a power for the mortgagee to pay £70 for renewal in case a life should drop; and it was held that a £2 stamp was sufficient, notwithstanding there was a covenant by the mortgagor to procure a renewal, without any limit of the sum to be paid by him for that purpose. In that case *Tindal*, C. J., says, "It is clear that the stamp on a mortgage, within the meaning of the act, is a stamp on a security in the nature of a mortgage, and not merely on any covenant. But there being in this deed a covenant that the mortgagor shall renew without limitation of the sum to be paid for renewal, it is contended that the uncertain amount so to be paid by him is a charge on the property mortgaged, because the mortgagee may sue for damages if it be not paid. That liability, however, is not within the meaning of the clause which imposes a duty of £25, where the deed is 'made as a security for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be, if the total amount of the money to be secured, or to be ultimately recoverable thereupon, shall be uncertain and without any limit;' that is, where the land or other subject-matter of the mortgage shall have an additional burthen cast upon it. The exception—'other than and except any sum or sums of money to be advanced for the insurance of any property comprised in such mortgage, or security against damage by fire, or to be advanced for the insurance of any life or lives, pursuant to any agreement in any deed, whereby any annuity shall be granted or secured for such life or lives,'—shews that such was the intention of the legislature."

(a) 3 Bing. N. C. 92; 3 Scott, 407.

So, in *Doe d. Scruton v. Smith* (a), where a mortgage-deed for £3000 contained a power of sale and leasing to secure the principal and all expenses, with interest; and there was also a covenant to pay principal and interest and all expenses, with interest on the amount of them: it was held not to be a security for an uncertain and indefinite amount, and that a £9 stamp was sufficient. In *Paddon v. Bartlett* (b), it appears to have been held that a mortgage to secure a principal sum, and also the costs of the trustees, and a reasonable sum by way of compensation to them for their trouble, required only a stamp of such an amount as would cover the principal sum. And in *Doe d. Mercer v. Bragg* (c), where a mortgage-deed, given to secure £300 and interest, contained a proviso for redemption if the mortgagor should repay the money advanced, with interest, and also should pay and satisfy all annual and other taxes, rates, and charges whatsoever, which from time to time should be payable in respect of the premises; and also contained a covenant to the same effect: it was held that the deed was properly stamped with an ad valorem stamp, and did not require the stamp of £25 on deeds securing a sum of indefinite amount. So, in *Dearden v. Binns* (d), which was the case of a bond; the words of the corresponding clause in the schedule, however, being similar, it was held that a bond conditioned for the payment of money and interest, and also for the performance of collateral acts, required only the ad valorem stamp appropriated to the principal sum, where that stamp exceeded the 1*l.* 15*s.*, which the collateral matter would require if it stood alone.—He also referred to *Pruessing v. Ing* (e).

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Peacock, contra.—The mortgage-deed having declared

(a) 8 Bing. 146; 1 M. & Scott, P. 644.

230.

(d) 1 Man. & Ry. 130.

(b) 4 Nev. & M. 1; 2 Ad. & E. 9.

(e) 4 B. & Ald. 204.

(c) 8 Ad. & E. 620; 3 Nev. &

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that the fines and expenses paid by the mortgagor in procuring the renewals of the lease were to be a charge on the property, the deed became a security for money to be thereafter advanced, and required the higher stamp. The words of the schedule to the 55 Geo. 3, c. 184, are, "and where the same respectively shall be made as a security for the repayment of money to be thereafter lent, advanced, or paid." Now, here, the estate is made a security for money to be afterwards advanced or paid, and the amount being "uncertain and without any limit," a stamp of £25 was requisite. If it were a mere personal covenant, it might be otherwise. [*Parke, B.*—Is it secured by the instrument as a mortgage?] It is submitted that it is, and that it is within the words of the act, which are—"if the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain and without any limit." Here the land is made a security, and is itself charged with the repayment of the money, the words of the covenant being, that the fines and expenses "shall be a charge on the aforesaid premises, together with interest" &c., "and the aforesaid premises shall not be redeemed or redeemable until payment of the amount of such costs, charges, and expenses, and the interest for the same, as well as the said sum of £500 hereby secured, and the interest for the same in manner aforesaid." In *Halse v. Peters* (a), it was held that a covenant for payment of the yearly premiums, and other costs and charges, of an insurance of £1000 upon a particular life for seven years, required a stamp of £25. In *Doe v. Bragg*, it was undoubtedly held, that a covenant for the payment of rates and taxes, to the performance of which the equity of redemption was made subject, did not make the mortgage subject to the higher duty: but that was on the ground that the rates and taxes would at all events be paid by the mortgagor, as the mortgagee would be entitled to the

(a) 2 B. & Ad. 807.

amount of them without any such stipulation. Here the security on the estate is the mortgagee's sole security. The renewals are for the benefit of the mortgagor; and, either as money lent or advanced, or as money paid, they bring the case within the second clause in the schedule.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—The question in this case arose upon the sufficiency of the stamp upon an assignment of leasehold property by way of mortgage, to secure the repayment of £500 advanced to the defendant. The stamp was £4. The objection was, that the total amount of the money secured was “uncertain and without limit,” and that the instrument required a stamp of £25. Lord *Denman* was of opinion that it did not, but reserved the point. We agree in this opinion, and therefore the rule to enter a nonsuit must be discharged.

The original lessor was under an obligation to renew the leases upon payment of £60. The mortgagor, the defendant, covenanted in the mortgage-deed to make these renewals. There was also a provision that the mortgagee, the plaintiff, might, on his default, himself renew, and a declaration that the fine paid by the plaintiff, and his costs, charges, and expenses of renewal, should be a charge on the mortgaged property. There was no covenant by the defendant to repay the plaintiff. It was contended that this clause made the mortgage a security for money to be thereafter paid, and subjected the instrument to the higher duty.

It is a well-settled rule of law, that every charge on the subject must be imposed by clear unambiguous words; *Denn v. Diamond* (a), *Doe v. Snaith* (b); and there are no

(a) 4 B. & C. 245.

(b) 8 Bing. 153.

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words in the statute which clearly impose a duty on such an instrument as this, beyond the ad valorem stamp on the £500 advanced.

In the schedule to the 55 Geo. 3, there are two classes of mortgages:

First, where the mortgage shall be made as a security for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing or forborne to be paid, being payable.

Secondly, where the same shall be made as a security for the *repayment* of money to be thereafter lent, advanced, or *paid*, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be; other than and except any sum or sums of money to be advanced for the insurance of any property comprised in such mortgage or security against damage by fire, or to be advanced for the insurance of any life or lives, pursuant to any agreement in any deed, whereby any annuity shall be granted or secured for such life or lives.

These two classes appear to embrace mortgages for all descriptions of *debts*: the first, present; the second, future. The first class, in express terms, embraces present loans and *debts* only. The second ought to be construed in the same way—to apply to future loans and debts only; for there is no reason why a mortgage for the same description of payment should be subject to duty in one case and not in another; why it should be subject to duty if made after the execution of the instrument, and not if made before. By holding that the word “paid” means so paid as to constitute a debt, and the repayment of which the mortgage is to secure, the whole enactment is rendered reasonable and consistent.

But then it is said, the exception in the clause of monies advanced for the insurance against fire, or on lives, in deeds granting annuities, explains the term “advanced or

paid," and shews that it was meant to include any sums advanced or paid by the mortgagee, whether they constituted a debt to him or not. But it is a sufficient answer to say, that this exception exempts all such advances or payments, even though they might constitute debts by the agreement of the parties. And this construction of the statute is in accordance with the decided cases. Those of *Paddon v. Bartlett* (a), and of *Doe v. Bragg* (b), decide that further charges for "a compensation for the trouble of trustees," and for "rates and taxes imposed on the premises," do not require a further sum. These are not loans, advances, or payments; and, in *Doe v. Snaith*, the words "all sums which the mortgagee should *expend* or *disburse* for or in respect of these presents" (though these are payments) were held not to make a further ad valorem stamp necessary; and the case of *Dickson v. Cass* (c), (which, although that of a bond, not a mortgage, depended on the construction of similar words), if not distinguishable on the ground that it really was a security for such advances as the bankers should make, as it was in terms, though there was a recital of an *agreement* by them to advance £1000 only, or on the ground mentioned by Lord Chief Justice Tindal in *Doe v. Snaith*, must be considered as overruled by the latter case. The case of *Halse v. Peters* (d) is also clearly distinguishable. There the premiums of insurance on a life policy were to be paid for the mortgagor, and repaid by him, and would therefore constitute a debt to the mortgagee; and the exception in the statute of premiums of insurance, being in respect of a grant of an annuity only, did not apply.

There is another principle on which some of the Judges appear to rest the case of *Doe v. Snaith*, and on which that of *Doe v. Bragg* also seems to have been put, and which is appli-

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(a) 4 Nev. & M. 1; 2 Ad. & Ell. 9.

(b) 3 Nev. & P. 644.

(c) 1 B. & Ad. 343.

(d) 2 B. & Ad. 807.

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cable to this, namely, that the expression in the instrument of that which the law implies has no effect as to the necessity of a further stamp, "*expressio eorum quæ tacitè insunt nihil operatur.*" Here the fines and costs of renewal would be a charge on the property without the stipulation in question.

For the above reasons we think the stamp sufficient, and therefore the rule must be discharged.

Rule discharged.

MEMORANDA.

IN Michaelmas vacation, 1841 (a), the following gentlemen were appointed her Majesty's counsel:—*Edward Wilbraham*, of Lincoln's Inn, Esq.; *Wilkinson Mathews*, of Lincoln's Inn, Esq.; *John Herbert Koe*, of Lincoln's Inn, Esq.; *John Godfrey Teed*, of Gray's Inn, Esq.; *William Loftus Lowndes*, of Lincoln's Inn, Esq.; *Thomas Purvis*, of Gray's Inn, Esq.; *John Walker*, of Lincoln's Inn, Esq.; *Kenyon Stevens Parker*, of Gray's Inn, Esq.; *James Russell*, of the Inner Temple, Esq.; *Robert Prioleau Roupell*, of Lincoln's Inn, Esq.; *Thomas Oliver Anderdon*, of Lincoln's Inn, Esq.; and *Loftus Tottenham Wigram*, of Lincoln's Inn, Esq.

In Michaelmas Term, 1842 (a), *Alfred Septimus Dowling*, of Gray's Inn, Esq., was called to the degree of the coif, and gave rings, with the motto "*Onus allexit.*"

In the present Easter Term, Sir *Gregory Allnutt Lewin*, Knight, of the Middle Temple; the Honourable *John Chetwynd Talbot*, of Lincoln's Inn; *Samuel Martin*, of the Middle Temple, Esq.; *John Arthur Roebuck*, of the Inner Temple, Esq.; *Digby Cayley Wrangham*, Serjeant at Law; and *William Henry Watson*, of Lincoln's Inn, Esq., were appointed her Majesty's counsel.

(a) These announcements were inadvertently omitted in their proper places.

IN THE EXCHEQUER CHAMBER.

Esch. Chamber.
1843.*(In Error from the Court of Exchequer.)*

SKEY v. CARTER and Another, Assignees of Smith, a Bankrupt. May 18th.

THE pleadings in this case were precisely the same as those in the case of *Whitmore v. Robertson* (a). Judgment having been signed in the Court of Exchequer for the plaintiffs below, a writ of error was brought thereon into this Court, which was argued in Michaelmas vacation, 1842 (b), by the *Attorney-General*, for the plaintiff in error, and by *R. V. Richards*, for the defendants in error.

The assignees of a bankrupt are entitled to recover in trover goods bona fide seized by an execution-creditor under a fieri facias on a judgment upon a warrant of attorney, after a secret act of bankruptcy, but not sold until after the date and issuing of the fiat, and notice thereof; and the stat. 2 & 3 Vict. c. 29, does not protect such an execution.

The Court took time to consider; and their judgment was now delivered by

TINDAL, C. J.—This was an action of trover by the defendants in error, as assignees of Thomas Smith, a bankrupt, against the plaintiff in error as one of the registered public officers of the Gloucestershire Banking Company, for the conversion by the company of certain goods belonging to the defendants in error as such assignees. The question raised by the pleadings was, whether a sale by the sheriff of the goods mentioned in the declaration under an execution at the suit of the banking company, was protected by the late statute of 2 & 3 Vict.

(a) 8 M. & W. 463.

Liama, Coltman, Erskine, and Maule, JJ.

(b) Dec. 1st, before Lord Denman, C. J., Tindal, C. J., Wil-

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c. 29. The facts admitted by the pleadings were, that the banking company had entered up judgment against the bankrupt by *nil dicit*—in an action not commenced adversely—on a warrant of attorney given to them by the bankrupt, but not by way of fraudulent preference; that a writ of *feri facias* had been issued upon such judgment; that afterwards, and after a secret act of bankruptcy of which the banking company had no notice, but before, and not within two months of, the date and issuing of the fiat, the goods in question were really and *bond fide* levied by the sheriff in execution under the writ of *feri facias*, and were, after the date and issuing of the fiat, and after notice, sold by him by the direction of the banking company. Upon these facts, the Court of Exchequer, in accordance with their former decision in *Whitmore v. Robertson*, gave judgment for the assignees; and this writ of error was brought to have that decision reviewed by this Court.

The question is one of considerable importance, and of some difficulty; but we think the solution of it by the Court below is correct.

The stat. 2 & 3 Vict. c. 29, after reciting the 82nd section of the stat. 6 Geo. 4, c. 16, and the 12th section of the stat. 2 Vict. c. 11, enacts, amongst other things, “that all executions against the goods and chattels of a bankrupt, *bond fide* executed or levied before the date and issuing of the fiat, shall be deemed valid notwithstanding any prior act of bankruptcy, provided the person at whose suit such execution shall have issued had not, at the time of executing or levying such execution, notice of any prior act of bankruptcy; provided also, that nothing therein shall be deemed or taken to give validity to any execution founded on a judgment on a warrant of attorney or cognovit given by any bankrupt by way of fraudulent preference.” This part of the enactment is obviously intended as a substitute for the 81st section of the stat. 6 Geo. 4, c. 16, though

that section is not mentioned in the preamble, and in effect gives to executions, executed or levied at any time before the date and issuing of the fiat, the same protection which the former statute had afforded to executions executed or levied more than two calendar months before the issuing of the fiat—with the exception of those falling under the proviso against fraudulent preference. It becomes important, therefore, to ascertain what was the law under the former statute, in relation to executions on judgments under warrants of attorney. The effect of the 81st section of the stat. 6 Geo. 4, c. 16, taken by itself, would be to protect all executions, whether before or after an act of bankruptcy, under which there had been a seizure more than two calendar months before the fiat, where the execution-creditor had no notice of a prior act of bankruptcy. But by the 108th section it is enacted, that “no creditor having security for his debt shall receive upon any such security more than a rateable part of such debt, except in respect of any execution levied by seizure upon the property of such bankrupt before the bankruptcy.” Stopping here, the effect of the 108th section at first sight appears to be to deprive every execution-creditor of the benefit of his execution, unless seizure had been made under it before any act of bankruptcy; and, if allowed to over-ride the 81st section, seems to render wholly inoperative the words “notwithstanding any prior act of bankruptcy” in that section. And this apparent inconsistency between the two sections led some of the Judges, in the case of *Godson v. Sanctuary* (a), to express, in wider terms than was necessary for the decision of that case, an opinion that the 108th section could not apply to any case of execution where the two months had not begun at the date of the seizure. But, in that case, the sale was before the commission issued;

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1843.

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(a) 4 B. & Ad. 255.

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and therefore, at the date of the commission, the execution-creditor had been satisfied, and had ceased to be a creditor having security for his debt; see *Wymer v. Kemble* (a); he was not, therefore, within the operation of the 108th section, and there was nothing to interfere with the protection afforded by the 81st section. If the law had remained unaltered, the expressions used in *Godson v. Sanctuary* would probably never have had any practical effect upon the rights of parties, as it was not likely that an execution levied by seizure more than two calendar months before the date of the commission would remain unperfected by sale at the date of the commission. But the alteration made by the late statute renders it necessary to examine more closely the true operation of the 108th section upon cases within the general terms of the 81st section: and, as it is our duty to give effect to all the clauses of the statute, if by any reasonable construction they can be made to stand together, we think that these two clauses may be reconciled by giving the 81st section the effect of an enactment that no execution (executed by seizure more than two calendar months before the date of the commission) which, but for a prior act of bankruptcy, would have entitled the execution-creditor to a preference over other creditors, should be defeated by any prior act of bankruptcy of which the execution-creditor had no notice. We also agree in the conclusion drawn by the Court below, and approved of by the present Lord Chancellor of Ireland (Sir *Edward Sugden*) in the case of *In re Perrin* (b), that the 108th section of the stat. 6 Geo. 4, c. 16, is still operative, and that the late act has not repealed or altered it, either expressly or by implication. Taking, therefore, those provisions of the stat. 2 & 3 Vict. c. 29, which are applicable to this case, as substituted for those in the 81st section of the former statute,

(a) 4 B. & C. 479.

(b) Dru. & War. 160.

the question in each case would be, whether the execution under consideration was one that, but for a prior act of bankruptcy, would have entitled the execution-creditor to such preference; and this question would be answered by reference to the 108th section of the 6 Geo. 4, c. 16. If the execution had been completed by sale before the date of the fiat, the 108th section would have no application, and the protection would be complete: if the execution had been levied by seizure only, the case would be within the exception, and would not be affected by the 108th section, unless it also came within the terms of the proviso. Now, the facts of the present case bring it within the terms of the enactment, and of the exception, and also of the proviso; and therefore leave it under the operation of the enactment, because the proviso takes it out of the operation of the exception. It is a case, therefore, in which the execution-creditor would have had no title to preference, even if there had been no prior act of bankruptcy, and consequently he is not brought within the protection of the stat. 2 & 3 Vict. c. 29.

The proviso relating to warrants of attorney given by way of fraudulent preference was evidently intended to cover cases where the sale as well as the seizure had taken place before the date of the fiat, and which, for the reasons already given, would not come under the operation of the 108th section; and probably to prevent any inference that might have been drawn from the insertion of the exception in cases of *payment*, and its omission in cases of execution; and does not, we think, afford any sound objection to the construction which the Court of Exchequer has put upon the earlier part of the clause.

The judgment, therefore, will be affirmed.

Judgment affirmed.

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1843.

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CARTER.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

TRINITY TERM, 6 VICT.

PRICE *v.* REES.

May 26.

In debt, the plaintiff demanded the sum of 10*l.* 18*s.*; the declaration then alleged, that the defendant was indebted to the plaintiff in £100 for work and labour, &c., and in £100 on an account stated; and averred, that although the defendant had paid 89*l.* 2*s.*, parcel of the said monies, yet he had not paid the residue, amounting to the sum of 10*l.* 18*s.* above demanded:—*Held*, that, on *nunquam indebitatus* pleaded to this declaration, the plaintiff was bound, in order to recover, to prove a debt exceeding the sum of 89*l.* 2*s.*

DEBT.—In the commencement of the declaration, the plaintiff demanded the sum of 10*l.* 18*s.*; and the declaration went on to allege, that the defendant was indebted to the plaintiff in £100 for work and labour and materials, and in £100 for money due on an account stated; and concluded with an averment, that although the defendant paid part of the said monies, that is to say, the sum of 89*l.* 2*s.*, parcel as aforesaid, yet he had not paid the residue of the said monies, amounting to the said sum of 10*l.* 18*s.* above demanded, or any part thereof.—Plea, *nunquam indebitatus*.

At the trial, before the under-sheriff of the county of Carmarthen, the plaintiff proved a debt for work and labour

done, and materials furnished by him for the defendant, to the amount of 18*l.* 10*s.* only. It was thereupon insisted for the defendant, that he was entitled to the verdict, unless the plaintiff proved a debt exceeding the sum of 89*l.* 2*s.*, the amount which was admitted by the declaration to have been paid. The under-sheriff reserved the point, and the plaintiff obtained a verdict, damages 7*l.* 10*s.*, with leave to move to enter a nonsuit or a verdict for the defendant.

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E. V. Williams having obtained a rule nisi accordingly,

Sir *John Bayley* now shewed cause.—This mode of declaring has been of late frequently adopted, and was suggested by this Court, in *Nicholl v. Williams* (a), to be the proper one in such a case, where the plaintiff goes for a balance. The payment being admitted on the record, the sum claimed in the action will be assumed to be a balance, on proof of which the plaintiff is entitled to recover. If the plaintiff had given credit for these payments by a bill of particulars, and that had been used in evidence by the defendant, the plaintiff could have recovered for the balance only; and the same rule ought to prevail where the payments are admitted on the record. If this objection be allowed to prevail, it will be like allowing a defendant to give evidence of payment under the general issue. It would subject the plaintiff to extreme inconvenience to compel him to prove the whole original debt, which might consist of several thousand pounds, and the costs of proof of the whole debt would not be allowed on taxation. The defendant has no right at the trial to say that the 10*l.* 18*s.* is the part paid, because the declaration expressly distinguishes the two sums. [Lord *Abinger*, C. B.—You must prove the whole debt, in order to shew that this is the balance of it. How can the plaintiff prove that

(a) 2 M. & W. 764.

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defendant had pleaded payment of 89*l.* 2*s.*, and nunquam indebitatus as to the residue, that would have obliged the plaintiff to prove a debt to a greater amount than 89*l.* 2*s.* The same rule must apply here. The decision in *Alston v. Mills* seems to be perfectly correct: but there the defendant pleaded non assumpsit, and payment of all the monies mentioned in the declaration; whereas here the plea is merely that he was never indebted modo et formâ, that is, for the balance.

GURNEY, B., concurred.

ROLFE, B.—I am of the same opinion. I do not see that this is an embarrassment arising from the particular mode of pleading adopted in this case. Wherever a plaintiff goes for the balance of any account, whether there be a plea of payment, or he have given credit for a part in the declaration, he must prove the whole account. It is said the Master would not allow the costs of proving the entire debt: but that is only saying that he would not do what it is his duty to do; because it is clear that he ought to allow the costs of all that it was necessary to prove in order to sustain the issue.

Rule absolute.

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1843.

May 29.

In an action by the assignee of a replevin bond, the defendant pleaded, that the bond was obtained from him in the name of the sheriff by T. H., under colour and pretence that he was a deputy of the sheriff for taking replevins, whereas he had no deputation or authority from the sheriff; *absque hoc* that the sheriff took the bond: on which issue was joined:—*Held*, that the only matter in issue was whether the sheriff took the bond; and that evidence of T. H.'s acting as the deputy of the sheriff was sufficient *prima facie* evidence of his appointment, and cast on the defendant the onus of proving his non-appointment.

FAULKNER v. JOHNSON and Others.

DEBT by the assignee of a replevin bond, given by the defendant to the sheriff of Staffordshire. Plea, (by one of the defendants), that the said supposed writing obligatory in the declaration mentioned was taken from him, the defendant, in the name of the sheriff of Staffordshire, by one T. H., under colour and pretence that the said T. H. was a deputy of the said sheriff for taking replevins; and that the said sheriff had not deputed the said T. H., nor had the said T. H. any authority, to take replevins, &c.: without this, that the said sheriff took the said writing obligatory, *modo et formâ*; concluding to the country: on which issue was joined.—The other defendants pleaded *nul tiel record*.

At the trial before *Gurney, B.*, at the London sittings after Easter Term, it appeared that the bond in question was given by the defendant to T. H., who acted as a replevin clerk for the sheriff; but no evidence was given of his actual appointment: and it was thereupon objected for the defendant, that his authority, being expressly put in issue, ought to have been specifically proved, by the production of his appointment. The learned Judge overruled the objection, and the plaintiff obtained a verdict, damages £321.

W. J. Alexander now moved for a new trial, on the ground of misdirection.—This plea put in issue the formal proof of the appointment of the replevin clerk, under the stat. 1 & 2 Ph. & M. c. 12, s. 3, and evidence of his acting as clerk merely was not sufficient in such a case, although ordinarily, no doubt, the acting in execution of a ministerial office is evidence from which to presume a valid appointment. [*Parke, B.*—The only matter put in issue is, that

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the sheriff took the bond.] *Modo et formâ*; that is, with reference to the former part of the plea. [*Parke, B.*—No; that is mere preamble, and not in issue.] The only evidence that the bond was taken by the sheriff was that it was taken by this person. The appointment lay within the plaintiff's knowledge; the defendant could not be expected to prove a negative. In *Griffith v. Stephens (a)*, the sheriff was prohibited from proceeding in a replevin suit, on the ground that the replevin had been granted by a person who was not duly appointed by the sheriff, although he had for many succeeding years been appointed by previous sheriffs to act in that capacity, and his acting as such was known to the then sheriff. In *Rex v. Verelst (b)*, where a party had acted as surrogate for many years, but he appeared not to have been appointed according to the canon law, Lord *Ellenborough* held that his authority to administer an oath was negatived. Here the question of a due appointment was sufficiently raised, by the form of the plea, to call upon the plaintiff for further evidence.

LORD ABINGER, C. B.—I think it was not raised at all: a defendant cannot raise such a question by a mere inducement to a traverse. Here he has given the bond to the sheriff, who has assigned it: that is sufficient *primâ facie* evidence, as against him, that it was properly taken. In *Rex v. Verelst*, the *primâ facie* evidence of the surrogate's authority to administer an oath was rebutted by proof: here the *primâ facie* evidence of appointment was not impeached. There will be no rule.

PARKE, B.—I am of the same opinion. All that is in issue in this case is, whether the sheriff took the bond; the inducement is no part of the issue. The defendant is just in the same position as if he had simply traversed the

(a) 1 Chit. Rep. 196.

(b) 3 Camp. 432.

fact, without any inducement: he cannot, by introducing a preamble to his traverse, alter the terms of the issue or the onus of proof. Then it is clear that a bond was given to the sheriff, and assigned by him; that is *primâ facie* evidence against the defendant, and he had none to rebut it. It became incumbent upon him to prove the non-appointment: and it is no answer to say that he would be thereby called upon to prove a negative. Parties to suits are frequently in that position. The defendant might have called the clerk himself to prove that he had never been appointed.

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v.
JOHNSON.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

BRADLEY v. URQUHART.

May 29.

KELLY moved for a rule to shew cause why the scire facias issued in this case (a) should not be set aside, as having been issued without leave of the Court.—It may be said that this application is too late, the case having already been argued on demurrer, and the judgment of the Court given for the defendant; but the answer is, that if the scire facias issued without leave of the Court, that is an absolute nullity, which cannot be waived by lapse of time, and not merely an irregularity. It is only by the 12th section of the act of Parliament, 4 & 5 Vict. c. lxxxix (b), that authority is given to issue execution against the members of this Company, and that is conditionally on the leave of the Court having been first obtained: without it, the scire facias is wholly unauthorized. Where an act of Parliament makes a proceeding conditional on something else to be done, if that be not done, the proceeding is altogether void. Thus, where the Lottery Act, 27 Geo. 3, c. 1, re-

In sci. fa. against a member of the Patent Rolling and Compressing Iron Company, under the 4 & 5 Vict. c. lxxxix, s. 12:—*Held*, that after the defendant had pleaded, and a demurrer to the plea had been argued, and judgment given thereon for the plaintiff, the defendant was too late to move to set aside the scire facias, on the ground that it had been issued without leave first granted by the Court, as required by that statute.

(a) See ante, p. 456.

(b) Set forth ante, p. 452.

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quired that, before suing for penalties under the act, the plaintiff should make an affidavit specifying the amount of the penalties sued for, and that amount should be specified in the first process, the proceedings were all set aside for want of these things being done: *Rex v. Horne* (a): and it was held that the objection was not waived by the defendant's putting in bail: *Goodwin v. Parry* (b). So, where a plea in abatement is filed without the requisite affidavit, it is a nullity; and no act of the plaintiff, apparently acquiescing in it, will be construed into a recognition of it: *Garratt v. Hooper* (c). In like manner, if a warrant of attorney, or cognovit, be not properly attested pursuant to the statute, it may be set aside after any lapse of time, or any steps taken by the parties (d). This is a proviso in immediate defeasance of the power given by the act of Parliament; and until execution has issued, the defendant is in time to take advantage of it.

PARKE, B.—I think it is too late, after the defendant has pleaded to the scire facias, and a demurrer to his plea has been argued, and judgment given against him, for him to come to set aside the scire facias on this ground. The statute does not say, that unless leave be first granted by the Court, the scire facias shall be void to all intents and purposes, but only that no execution shall issue without leave first granted by the Court. If that be not done, the defendant should take the objection in due time, and not plead to the scire facias.

The rest of the Court concurred.

Rule refused.

(a) 4 T. R. 349.

(b) Id. 577.

(c) 1 Dowl. P. C. 28.

(d) See *Gripper v. Bristow*, 6 M. & W. 807; *Cox v. Edwards*, 2 Dowl. P. C. (N. S.) 55.

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May 29.

THE ATTORNEY-GENERAL v. HUREL.

THIS was an information against the defendant for penalties under the Customs Regulation Act, 3 & 4 Will. 4, c. 52, and the Smuggling Prevention Act, 3 & 4 Will. 4, c. 53 (a).

The first count charged the defendant with having been concerned in the illegal unshipping of certain customable goods, the duties on which had not been paid. The second count charged, that goods illegally unshipped, the duties on which had not been paid, had come to the possession of the defendant, he well knowing the same to have been illegally unshipped; and the third charged, that he knowingly harboured and concealed goods which had been illegally unshipped without payment of the duties.

At the trial before Lord *Abinger*, C. B., at the Middlesex sittings after Easter Term, it appeared that the goods in question had been, in the first instance, landed provisionally by bill of sight, under the 3 & 4 Will. 4, c. 52, s. 24; and that afterwards a forged and fraudulent "perfect entry" was made out, by which a smaller quantity of goods appeared to be imported than was the fact, and under which the goods were removed from the Custom-

Where customable goods are landed by bill of sight, under the 3 & 4 Will. 4, c. 52, s. 24, and are afterwards removed without payment of duties, and without a perfect entry having been made of them pursuant to that statute, they are in the situation, for all purposes, of goods illegally unshipped, and all persons who assist in removing or harbouring them, knowing due entry not to have been made, are liable to the penalties imposed by the 3 & 4 Will. 4, c. 53, s. 44.

(a) The following sections of the acts are material:—

The 3 & 4 Will. 4, c. 52, s. 18, enacts, that the person entering any goods inwards shall deliver to the collector or controller a bill of the entry of such goods, expressing (amongst other things) the quantity and description of the goods, and the number, and denomination and description of the respective packages containing them.

Sect. 24 enacts, that if the importer of any goods, or his agent,

after full conference with him, shall declare before the collector or controller, that he cannot, for want of full information, make a full or perfect entry of such goods, and shall make and subscribe a declaration to the truth thereof, it shall be lawful for the collector and controller to receive an entry, by bill of sight, for the packages or parcels of such goods, by the best description which can be given, and to grant a warrant thereupon, in order that the same may be provisionally landed,

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house; and the question was, whether the defendant was a party to this fraud. It was however contended, on his behalf, that, inasmuch as the goods were regularly landed under the bill of sight, they could not be said to have been "illegally unshipped;" and therefore this information could not be sustained. The Lord Chief Baron overruled the objection, and a verdict was found for the Crown, leave being reserved to the defendant to move to enter a verdict of not guilty, if the Court should think the above objection well founded.

Erle now moved accordingly.—The goods, having been landed under the bill of sight, were *legally* landed, and became subject to the control and inspection of the custom-house officers, and cannot be said to have been illegally *un-*

and may be seen and examined by such importer, in presence of the proper officers; and within three days after any goods shall have been so landed, the importer shall make a full and perfect entry thereof, and shall either pay down all duties which shall be due and payable upon such goods, or shall duly warehouse the same, according to the purport of the full and perfect entry or entries so made for such goods &c.: Provided, that if, when full or perfect entry be at any time made for any goods provisionally landed as aforesaid, by bill of sight, such entry shall not be made in manner hereinbefore required for the due landing of goods, such goods shall be deemed to be goods landed without due entry thereof, and shall be subject to the like forfeiture accordingly.

By sect. 28, goods landed by bill of sight, and fraudulently concealed or packed with intent to deceive the

officers of customs, are to be forfeited.

By the 3 & 4 Will. 4, c. 53, s. 44, persons who shall assist or be otherwise concerned in the unshipping of any goods which are prohibited to be imported, or the duties for which have not been paid and secured, or who shall knowingly harbour, keep, or conceal, &c., any goods which have been illegally unshipped without payment of duties, or which shall have been illegally removed from any warehouse or place of security, &c., or to whose hands and possession any such uncustomed or prohibited goods shall knowingly come, or who shall assist or be concerned in the illegal removal of any goods from any warehouse or place of security, shall forfeit either the treble value thereof, or the penalty of 100*l.*, at the election of the commissioners of customs.

shipped, merely because the subsequent entry, under which they were removed, was fraudulent. The general prohibition of the 3 & 4 Will. 4, c. 52, s. 2, is, that "no goods shall be *unladen from any ship* arriving from parts beyond the seas," before due report of the ship and *due entry* of the goods shall have been made, and warrant granted in manner thereafter directed. That implies that there is a license to land the goods, if those forms be observed. Then the 24th section empowers the importer of goods, on his making declaration that he cannot for want of full information make a full or perfect entry of the goods, to make an entry by bill of sight, upon which the collector or controller is authorized to grant a warrant, in order that they may be provisionally landed, a perfect entry being made within three days afterwards. The Crown relies on the proviso contained in that section, that if, when perfect entry be so made, it shall not be made in manner thereinbefore required for the due landing of goods, "such goods shall be deemed to be goods landed without due entry thereof, and shall be subject to the *like forfeiture* accordingly." But this is not an information for the *forfeiture* of the goods, but for *penalties* under the 44th section of the 3 & 4 Will. 4, c. 53. That act contains provisions for the imposition of forfeitures as well as of penalties; see ss. 28, 30, 31. The Crown ought to have proceeded for the *illegal removal* of the goods, which is provided against by the same clause. The words, "assist or be concerned in the unshipping of any goods," ought not to be strained beyond their natural meaning. The construction contended for by the Crown would make a person *ex post facto* liable who innocently assisted in the actual unshipping.

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LORD ABINGER, C. B.—In this information for penalties, the question which I submitted to the jury, and upon which they found their verdict against the defendant, was as to his knowledge of the fraudulent transaction, and

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upon that point it appeared to me that their verdict was perfectly correct. But a legal objection is taken to the information; and it is contended, that, as these goods were landed by bill of sight, under the inspection and control of the Custom-house officers, the fraud subsequently committed could not render their unshipment illegal. It seems to me that a very short and complete answer was given to the objection by the *Attorney-General* at the trial, founded upon the proviso in the 24th section of the 3 & 4 Will. 4, c. 53, which authorizes the landing by bill of sight. By previous sections of the act, no goods can be landed without a full and perfect entry made of their contents. Then, the 24th section, after allowing the provisional landing of the goods by bill of sight, in cases where the importer declares that he cannot, for want of full information, make a full and perfect entry, provides, that "if, when full or perfect entry be at any time made for any goods provisionally landed as aforesaid by bill of sight, such entry shall not be made in manner thereinbefore required for the due landing of goods, such goods shall be deemed to be goods *landed without due* entry thereof, and shall be subject to the like forfeiture accordingly. Now, goods landed without due entry are clearly *unlawfully* landed; and therefore, the non-payment of the duty, and the fraud in not making a perfect entry according to the directions of the statute, take the goods out of the protection of the previous clauses of the statute, and leave them in the same condition as if they were landed without any entry at all, and therefore "illegally unshipped." But then Mr. *Erle* says, that the defendant was not thereby liable to penalties, but merely to a forfeiture of the goods. But it must be recollected, that, by the 3 & 4 Will. 4, c. 53, s. 44, penalties are specifically imposed on the unshipping of goods which have not paid duty, or the harbouring of such as have been illegally unshipped; and there is no inconsistency in making such goods liable to forfeiture, and

also subjecting to penalties the persons concurring in unshipping or harbouring them. The only question, therefore, is, whether these goods were *unlawfully unshipped*. They are so, if they are landed without due entry; and, by the express provision of the statute, goods, upon which a perfect entry is not *bonâ fide* made according to the directions therein contained, are to be deemed to have been landed without due entry. There will therefore be no rule.

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PARKER, B.—I am of the same opinion. Although the 24th section is, perhaps, not worded with that correctness which is desirable in such a case, its meaning is very clear: that if the goods be unshipped without entry, by bill of lading, and a perfect entry be not afterwards made, they are in the same situation as if they had been unshipped without payment of duty, and without any entry at all. The meaning of the proviso is, that the goods are in such a case to be deemed, for all purposes, and not merely for that of forfeiture, to have been illegally landed without due entry; and therefore all the consequences of receiving or harbouring goods landed without due entry, or without payment of duty, must follow from it. But Mr. *Erle* says, that it would be hard to make any innocent person, who may merely have assisted in unshipping the goods, liable to a penalty because of a subsequent fraud. That consequence, however, would not follow. The meaning of the clause is, that *from the moment when* due entry ought to be made, and is not made, the goods are to be deemed illegally unshipped, and subject to the consequences of being so; and those persons only who are afterwards concerned in removing or harbouring them, knowing them to have been illegally unshipped,—that is, knowing that a perfect entry has not been made, or that the duties have not been paid,—are liable to the penalties. That construction obviates the inconvenience mentioned by Mr. *Erle*, and on which he

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argues for the more limited construction of the 24th section. It seems to me, therefore, that all goods as to which, in the language of that section, a perfect entry has not been made, are in the situation of goods illegally unshipped; and consequently that the defendant, who received these goods, knowing the duties not to have been paid upon them, is liable to the penalties contained in the 3 & 4 Will. 4, c. 53, s. 44.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

May 25.

MASON v. BRADLEY.

In an action by the payee against the maker of a joint and several promissory note, the defendant is not entitled, under the plea that he did not make the note, to set up a defence that he signed the note as surety, on the faith that other persons would also sign it as sureties, and that the name of one of them who had so signed was cut off from the note.

Semble, that the note was vitiated by cutting off the signature of one of the joint and several makers from it.

ASSUMPSIT by the payee against the maker of a joint and several promissory note.

Plea, that the defendant did not make the said note modo et formâ, and issue thereon.

At the trial before *Gurney, B.*, at the Middlesex sittings after last Hilary Term, it appeared that the defendant had signed the note in question, which was a joint and several note, as a surety, on the faith that six other persons would sign it as co-sureties with him. These six persons did accordingly sign the note; but on the note being produced at the trial, it appeared that the name of one Jephson, the last person who had signed, had been cut off from the note. It was thereupon objected by the defendant, that the name of one of the makers of the note having been cut off, this vitiated the note altogether: to which it was answered that such a defence could not be set up under the plea that the defendant did not make the note. The learned Judge inclined to this latter view, but directed the jury to find a verdict for the defendant, giving the plaintiff liberty to move to enter a verdict for the amount of the note, if the Court

should be of opinion that the defendant could not avail himself of such a defence under this plea.

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Wortley having, in Easter Term, obtained a rule accordingly,

Pashley (*Baines* with him) now shewed cause.—The note was altogether vitiated by cutting off the name of one of the makers of it. In *Pigot's case* (a), it was expressly laid down, that “if two be bounden in an obligation, and afterwards the seal of one of them is broken off, this non feissance ex post facto shall make void the whole deed against both:” and *Mathewson's case* (b) is cited. In *Collins v. Prosser* (c), where it was held that in the case of a *several* bond, the removing of the seal of one of the obligors did not render it void as to the others, *Bayley, J.*, says, “Where parties enter into a joint and several bond for payment of an entire sum of money, whatever discharges one of the obligors, may discharge the others.” And *Holroyd, J.*, after observing that it was not a joint and several bond, says, “The question is, whether cancelling the bond as to one destroys it altogether. It has been argued that it does, because the obligors are in a worse situation in law than they otherwise would have been. If the parties had been severally bound in one penalty only, there would be force in the argument. But this is not a bond for the payment of the same sum; each is bound in a different penalty, although to the same amount; and it does not make any one responsible for the penalty of the other. But it is said, the parties have a right to contribution at law. If, indeed, they had all been bound severally in the same penalty, then any one paying would pay that which another was liable to pay, and so benefit him. That would give a remedy at law for contribution. But the remedy

(a) 11 Rep. 286. (b) 5 Rep. 23. (c) 1 B. & Cr. 682; 3 D. & R. 112.

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at law is founded upon the principle, that one pays that to which all are liable." Now here the name of one of the makers being removed from the note, the defendant would lose his right to contribution against him, if the note were held to be still valid, and the amount recovered from him. *Bruerton's case* (a) is also in point. It may be said, however, that all those were cases of instruments under seal: but in *Master v. Miller* (b), it was expressly held that the same principle applies to all written instruments, and that all such instruments which are altered or erased are thereby avoided. But, secondly, it will be said that the defendant cannot set up this defence under the plea that he did not make the note. But it is submitted that he is clearly entitled to do so, for he only signed the note, and rendered himself liable upon it, upon the condition that the others should make themselves jointly liable with him, against whom he might, in the event of his being called upon to pay the amount of the note, have a remedy for contribution; but this alteration takes away his remedy against Jephson, and completely alters his situation, and makes it a different instrument. In *Cock v. Coxwell* (c), it was held that a defendant, under a plea that he had never accepted the bill, might shew that it had been altered after acceptance. There it was argued that such a defence ought to be specially pleaded; but *Alderson*, B., observed, "He has pleaded it specially, by saying that he did not accept the bill you declared on, and produced in evidence, but a different one." And per *Bolland*, B.—"The defendant says, in substance, the instrument on which you claim against me I never accepted. It cannot be said to be the same instrument, if there has been any alteration." And in *Calvert v. Baker* (d), *Parke*, B., says, "On the plea of non est factum, cannot an alteration in the deed after its

(a) 6 Rep. 2 a.

(b) 4 T. R. 320.

(c) 2 C., M. & R. 291.

(d) 4 M. & W. 417.

execution be given in evidence?" There the defendant, *Exch. of Pleas, 1843.* under a similar plea to the present, was allowed to shew that the bill was altered after acceptance, by making it payable at a particular place. So it has been held, that the defence that the requisites of the Statute of Frauds have not been complied with, may be taken advantage of under the general issue: *Buttemere v. Hayes (a)*, *Eastwood v. Kenyon (b)*.—He also referred to Byles on Bills of Exchange, 248.

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Wortley and Mellor, contrà, were stopped by the Court.

LORD ABINGER, C. B.—I am of opinion that the plaintiff is entitled to have the rule made absolute, on the ground that there is no plea on the record to raise the defence set up. Under this plea, that the defendant did not make the note, the plaintiff is entitled to succeed, on shewing that the precise note declared on was signed by the defendant, for that was the point in issue.

PARKER, B.—I am of the same opinion. It would probably turn out, on examination, that this note was made void by the removal of Jephson's name from it, according to the authority of *Pigot's case*, and the other authorities which have been cited. But the question is, whether the defendant can avail himself of such a defence, under the plea that he did not make the note. No objection is taken respecting the sufficiency of the stamp; and the note, when produced in evidence, agrees with the statement of it in the declaration, for it is signed by the defendant. There is, therefore, no objection on the ground of variance; but the objection raised is, that the liability of the parties to the instrument has been altered by the removal of the name of one of them. Now, that is a defence which should be specially pleaded, according to the well-considered judgment of the Court of Queen's Bench, in *Hemming v.*

(a) 5 M. & W. 456. (b) 11 Ad. & Ell. 438; 3 Per. & D. 276.

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Trenery (a). That was an action on a guarantie, to which the plea was non assumpsit; the instrument appeared to have been materially interlined after execution, by the insertion of a condition limiting the responsibility of the defendants; and the Court held that the plaintiff was entitled to recover, and that the above defence ought to have been specially pleaded. As to the case of *Calvert v. Baker*, the Court do not appear to have adverted to the circumstance, that the alteration in the bill sued on was not such as to require a new stamp; and I am under an impression that this Court pointed out that distinction a few terms ago, and expressed a doubt as to the authority of that case to that extent. I do not think that case can be supported, where the alteration is not such as to cause a variance between the statement in the declaration and the instrument when produced, or to raise an objection to the stamp on the document; it is only applicable where the alteration is such as to put an end to existing liabilities. This is a defence of a different nature, which, since the New Rules, ought to be specially pleaded.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

(a) 9 Ad. & Ell. 926; 1 Per. & D. 661.

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EDWARDS and Others, Assignees of MARSHALL and HALL,
Bankrupts, v. SHEEREN.

June 1.

THIS was an action on the case against the defendant, for maliciously suing out a fieri facias against the bankrupts on a warrant of attorney, after the amount secured thereby had been paid and satisfied to the defendant. There were also counts in trover, laying the possession in the bankrupts respectively, before the bankruptcy, and also in the assignees. The defendant pleaded, first, to the first count, not guilty; secondly, to the whole declaration, a denial of any act of bankruptcy having been committed; and, thirdly, as to the counts in trover, a justification under the judgment on the warrant of attorney. At the trial, before Lord *Denman*, C. J., at the last assizes for the county of Surrey, it appeared that a fiat issued against the bankrupt Marshall on the 7th, and against Hall on the 9th of November, 1842. This action was commenced after the passing of the 5 & 6 Vict. c. 122; and the only evidence given to prove the act of bankruptcy was the London Gazette of the 11th of November, 1842, (on which day that statute came into operation), containing an advertisement that the parties had, on a previous day, been declared bankrupts, together with proof that they had not, within twenty-one days afterwards, taken any proceedings to dispute or annul the fiat. For the defendant it was contended, that, inasmuch as the adjudication of the bankruptcy was previous to the commencement of the act of Parliament, the 24th section (a), which makes the Gazette

The 24th section of the Bankrupt Act, 5 & 6 Vict. c. 122, whereby the London Gazette, containing the advertisement of the adjudication of bankruptcy, is made, in certain cases, conclusive evidence of the bankruptcy, does not apply to adjudications made before the 11th of November, 1842, on which day the act came into operation.

(a) The 23rd section of the act enacts, that before notice of any adjudication of bankruptcy, under any fiat in bankruptcy issued after the commencement of this act, shall be given in the London Gazette,

&c., a duplicate of such adjudication shall be served on the person so adjudged bankrupt, and such person shall be allowed five days from the service of such duplicate to shew cause to the Court against

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conclusive evidence of the act of bankruptcy, did not apply, and therefore that there was no proof of an act of bankruptcy; and the Lord Chief Justice, being of this opinion, directed a verdict for the defendant, reserving leave to the plaintiffs to move to enter a verdict for them, if the Court should be of opinion that the production of the Gazette entitled them to a verdict on the second issue.

the validity of such adjudication; and that if he shall, within the time thereby allowed in that behalf, shew to the satisfaction of the Court that the petitioning creditor's debt, trading, and act of bankruptcy, upon which such adjudication shall have been grounded, or any or either of such matters, are insufficient to support such adjudication, and no other in lieu of them shall be proved to the satisfaction of the Court, the Court shall cause a memorandum in writing to be filed with the proceedings, that the fiat is annulled, and the same shall thereby be annulled accordingly; but if, at the expiration of such time, no cause shall have been shewn to the satisfaction of the Court for the annulling of such adjudication, such Court shall forthwith, after the expiration of such time, cause notice of such adjudication to be given in the London Gazette, and shall thereby appoint two public sittings of such Court for the bankrupt to surrender and conform, &c.

The 24th section enacts, "that if the bankrupt shall not, (if he were within the United Kingdom at the date of the adjudication), within twenty-one days after the advertisement of the bankruptcy in the London Gazette, or (if he were in

any other part of Europe at the date of the adjudication) within three months after such advertisement, or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit, or other proceeding to dispute or annul the fiat, and shall not have prosecuted the same with due diligence and with effect, the Gazette containing such advertisement shall be conclusive evidence in all cases as against such bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat, and that such fiat was sued forth on the day on which the same is stated in the Gazette to bear date, saving all rights which shall have accrued to any such person as aforesaid previous to the commencement of this act, and in respect of which any proceedings shall be pending at the time of the commencement of this act, which shall be adjudged and determined as if this act had not been passed."

Channell, Serjt., having obtained a rule nisi accordingly (a),

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Thesiger (with whom were *Platt* and *Fish*) shewed cause.

—This case depends on the construction of the 23rd and 24th sections of the 5 & 6 Vict. c. 122. That act of Parliament received the royal assent on the 12th of August, 1842, and the first section provided that it should take effect *from and after* the 11th day of November in that year: and the question is, whether the 24th section is to be considered as applying retrospectively to adjudications previously made. Now that section must be read with reference to the 23rd, all the terms of which are prospective, and which provides for the service of a duplicate of the adjudication on the bankrupt, and allows him a period of five days thereafter to shew cause against its validity, before notice of it can be advertised in the Gazette. It is plain, therefore, that these enactments can only apply to adjudications to be afterwards made. [*Parke*, B.—The clause applies only to such advertisements as are made after the passing of the act, with the formalities required thereby.]—They were then stopped by the Court.

Peacock and *Bovill*, *contra*.—It is not disputed that the 23rd section of the 5 & 6 Vict. c. 122 is limited to adjudications made, and advertisements published, after the act came into operation; but it is submitted that the 24th section is not so limited, and that the language of it plainly indicates the intention of the framers of the act, that it should have a retrospective effect from the 12th of August preceding, the day on which the act was passed. The words of this section are in the past tense throughout. It

(a) Another question also arose the defendant of the sum secured in the case; viz. whether, under by the warrant of attorney was in the plea of not guilty to the special issue: as to which see *Gough v. Cribb*, ante, p. 497.

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begins by enacting, that, "if the bankrupt shall not *have commenced* an action," &c.; and again, "if he *were* within the United Kingdom at the date of the adjudication," &c. It applies only to those cases in which the bankrupt might have sued if he had not been adjudged bankrupt, and not to cases where the assignees' right of action is founded upon the bankruptcy, as for a fraudulent preference. There is no injustice in allowing the assignees to sue in all such cases, provided the debtor be relieved from any proceeding at the suit of the bankrupt. And it is a strong argument in favour of its retrospective application, that upon any other construction the last clause of the section, saving all previous rights in respect of which proceedings should be pending at the time of the commencement of the act, would be superfluous. This Court had held, in *Moore v. Phillips* (a), that the 2 & 3 Vict. c. 29 was not retrospective; and it may fairly be presumed that this 24th section was purposely framed to alter the law in that particular. Several of its clauses—for instance the 80th and 83rd—are plainly retrospective; and the 93rd section directs, that the act shall be construed beneficially for creditors.

LORD ABINGER, C. B.—Notwithstanding the ingenious argument of the plaintiff's counsel, I am still of the same opinion, that the 23rd and 24th sections must be read together, and that the admissibility of the Gazette in evidence, as provided for by the 24th section, must be understood with reference to such an adjudication as is spoken of in the 23rd. There is no magic in the word "section," as applied to an act of Parliament, nor is it any reason that we should construe its provisions differently, that they are denoted by different numbers. There may, perhaps, be some difficulty in interpreting the saving at the end of the 24th section, although a case may be conceived to which it

(a) 7 M. & W. 536.

may have been intended to apply ; as, for instance, if a man commenced an action, and while it was pending became bankrupt, this clause may save his rights, and the action may be tried as if nothing had intervened. Laws are in general prospective in their operation ; when they are not so, it is an exception to the general principle acted on by the legislature, and must be clearly established. In this case I am of opinion that the Gazette was not evidence of the bankruptcy, and therefore that this rule ought to be discharged.

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GURNEY, B., concurred (a).

ROLFE, B.—I am of the same opinion. I understand the law under these sections of the statute to be, that, with a view to a satisfactory mode of determining the question of bankruptcy, a proceeding is instituted analogous to that of a rule calling upon the party to shew cause why he should not be adjudged a bankrupt ; if he does not successfully do so, the adjudication is to take effect, and is to be published in the Gazette, which is to be conclusive evidence of the bankruptcy, unless within twenty-one days thereafter the party commence some proceeding to dispute the fiat. Both sections ought to be read together. Nearly the same point arose in the case of *Kay v. Goodwin* (b). There the Lord Chief Justice of the Common Pleas, speaking of the 92nd section of the 6 Geo. 4, c. 16, says—" If the 92nd section is considered as affecting commissions which were then in a course of operation, it would materially alter the situation both of the bankrupt and of the parties claiming a remedy under the commission. It would alter the situation of the bankrupt, because it would enable his assignees, and it would enable other persons, to conclude him as a bankrupt without the possibility of his contesting his

(a) *Parke*, B., had left the Court before the close of the argument. (b) 6 Bing. 576 ; 4 M. & P. 341.

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bankruptcy within the period of time which the statute meant to allow him. It would also materially affect the interests of other persons, because, whenever this conclusiveness of evidence is to take effect, the 93rd section has provided, that parties who were called upon to pay their debts should have a power, by the space of two months, to pay their money into Court, during which time this question of bankruptcy might be tried; that power would be entirely taken away from them, and this construction would entirely deprive them of the benefit of that clause."

The same evil would arise in this case; and it seems to me to be one of so monstrous a nature, that even if any embarrassment were to result from the proviso introduced, *ex majori cautela*, at the end of the 24th section, I should be inclined to pass it over, rather than adopt the conclusion that the legislature intended to create the difficulties and inconveniences which would ensue if we construed it in the manner contended for by the plaintiff's counsel. For these reasons, I concur in thinking that this rule ought to be discharged.

Rule discharged.

June 9.

DOE *d.* DAVENPORT, Knt., v. RHODES and Another.

Whether,
where a tenant
holds a farm
from year to
year, the lands
from the 2nd of
February, and
the house from
the 1st of May,

EJECTMENT to recover a messuage, farm, and lands in the township of Bramall, in the county of Chester. The demise was laid on the 3rd of February, 1843. The consent-rule was in the ordinary general form, to defend "for

the house from the 1st of May, a notice to quit the whole, given half a year before the 2nd of February, is sufficient to entitle the landlord to recover the whole in ejectment, on a demise dated the 3rd of February, *quære*.

Where a defendant in ejectment has entered into the ordinary general consent-rule, the *verdict* is general, and the defendant is not entitled to have it entered for him as to any part of the premises to which the lessor of the plaintiff fails to prove a title.

In ejectment, the cause was misdescribed in the venire and distringas juratores, as being "between Sir S. D. Knight" (the lessor of the plaintiff, instead of "John Doe on the demise of" &c.) "and A. R. defendant." The objection was taken at Nisi Prius, before the jury were sworn, and overruled:—*Held*, no ground for granting a new trial.

the premises in question," admitting them to consist of "two messuages, two dwelling-houses," &c. &c. as stated in the declaration. The cause came on for trial at the last Chester Assizes, before *Williams*, J. Before the jury were sworn, *Evans*, for the defendant, objected that the learned Judge had no authority to try the cause, on the ground that in the title of the venire and distringas juratores it was misdescribed as being between "Sir Salusbury Davenport, knight, [instead of "John Doe on the demise of" &c.], plaintiff, and Alice Rhodes and James Rhodes, defendants." The learned Judge thought, however, that this was no ground for his refusing to try the issue joined on the record; and the jury were accordingly sworn, and the trial proceeded. It appeared in evidence, that the farm in question was demised by the lessor of the plaintiff to the defendants, by an agreement dated 30th September, 1835, to hold the lands, excepting a sufficient outlet or boozey pasture, from the 2nd of February, and the house and outbuildings, with the outlet or boozey pasture, from the 1st of May, then next, for the term of one year, and afterwards from year to year so long as both parties should please, at the yearly rent of £275, to be payable half-yearly, on the 25th of March and the 29th of September in each year. On the 1st of August, 1842, a notice was served on the defendants to quit the farm on the 2nd of February then next, or at such other time or times as their tenancy should expire next after the expiration of half a year from the delivery of the notice. It was contended for the defendants, that this notice was not sufficient to entitle the lessor of the plaintiff to recover the house, outbuildings, and outlet, as to which the term would not expire until the 1st of May following. The learned Judge reserved the point, and the plaintiff had a general verdict.

In Easter Term, *Evans* obtained a rule to shew cause why the verdict should not be limited to the lands, exclusively of the house, outbuildings, and outlet; or why there

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Welsby (with whom was *Jervis*) now shewed cause.—
 First, it is submitted that the lessor of the plaintiff was entitled, under this demise, to recover *the whole* of the premises. The lands were let from the 1st of February, and the notice to quit was given six months before that day. The lands were the substantial part of the holding; and the result of the authorities on this subject is, that a notice which refers to the day of entry on the substantial part of the holding determines the tenancy as to the whole. It is true that none of the cases are precisely in point to the present; because in all of them the question was whether, where the notice to quit was given in sufficient time for the *latter* of several days from which the premises were held, but not six months before the *former* of such days, it determined the tenancy as to the whole, by its reference to the period of entry on the substantial part of the demise. But the principle to be derived from those cases appears to be, that the tenancy as to the whole premises is to be taken as dating from the time of entry on the substantial subject of the holding, the tenant having also the liberty or privilege, if he performs his contract as to that, of entering upon the other part at an earlier day, or retaining it till a later day, for the more convenient enjoyment of the whole. The first case is that of *Doe d. Dagget v. Snowden (a)*. There the agreement was to take a farm, the arable land from Old Candlemas, the pasture from Old Lady-day, and the meadow from Old May-day, paying rent half-yearly, at Old Michaelmas and Lady-day. On the 30th of September, 1777, the plaintiff gave the defendant a notice to quit the arable land on the 13th of February next, the pasture on the 5th of April, and the meadow on

(a) 2 W. Bla. 1224.

the 12th of May. It was held that the taking was substantially a taking of the whole from Old Lady-day, and that the notice was sufficient to determine the tenancy in the whole. In *Doe d. Strickland v. Spence* (a), the tenant of a farm agreed to enter on the tillage-land at Candlemas, and on the house and other premises at Lady-day, and that when he left the farm, he should quit the same according to the terms of entry as aforesaid; the rent being reserved half-yearly, at Michaelmas and Lady-day. A notice to quit, delivered half a year before Lady-day, but not half a year before Candlemas, was held good. Lord *Ellenborough* there says, "The rule of law originally was, that *reasonable notice* to quit should be given where notice was necessary between landlord and tenant. What notice shall be deemed reasonable has received a construction so long ago as the reign of Henry VIII., in a case in the Year Book (b), that it shall be half a year's notice. Then the case of *Doe d. Dagget v. Snowden* has decided, that the notice to quit shall refer to the substantial day of entry of the tenant, though he may have before entered on the arable land for the purpose of ploughing and preparing it; and that the in-coming tenant may have the privilege of entering upon him for the same purpose, antecedent to the time of the notice." In *Doe d. Bradford v. Watkins* (c), the agreement was dated in January, and was a demise of a dwelling-house and other buildings, for the purpose of carrying on a manufacture, together with certain meadow, pasture, and bleaching grounds, for a term of thirty-five years, to commence, as to the meadow ground, from the 25th of December preceding, as to the pasture, from the 25th of March next, and as to the rest of the premises, from the 1st of May; reserving the rent half-yearly, on the day of Pentecost and at Michaelmas: and it was held, that, the substantial part of the demise being the

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(a) 6 East, 120. (b) 13 Hen. 8, 15 b, 16. (c) 7 East, 551.

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house and buildings for the purpose of the manufacture, a notice given half a year before the 1st of May determined the tenancy in the whole of the premises. Lord *Ellenborough* said, that the possession of the meadow ground on the 25th of December was "to be considered as a mere liberty of entering upon a part, for the purpose of preparing for the more convenient enjoyment of the rest and the principal object of the demise." There the demise in the ejectment was certainly laid subsequent to the 1st May; but the meaning of the notice being "good for the whole" must be, that after the expiration of it the landlord is entitled to the possession of the whole, if its terms be not complied with by the tenant. [He referred also to *Doe d. Kindersley v. Hughes (a)*.] Here, if the defendants performed their contract, by quitting the land in February pursuant to the notice, and thereby enabling the in-coming tenant to cultivate the farm, they would retain the privilege of keeping possession of the house and outlet until May; otherwise not.

But secondly, even if this notice to quit be good for the lands only, the *verdict* cannot be limited, although the execution may. A general consent-rule admits the possession and ouster of the whole premises; the defendants defend for all; and by the verdict the plaintiff recovers *his term* in the whole, which is not a severable thing. *Doe d. Bishton v. Hughes (b)* is an express authority to that effect.

Lastly, the error in the jury process can be no ground for granting a new trial of the issue joined between the parties. The proper remedy is a writ of error coram vobis: *Rogers v. Smith (c)*. In *Gee v. Swann (d)*, where the objection was taken at the trial, that no writ of *distringas juratores* had been returned by the sheriff, this Court expressly refused on that ground to entertain a motion for a new

(a) 7 M. & W. 139.

& M. 460.

(b) 2 C. M. & R. 281.

(d) 9 M. & W. 685.

(c) 1 Ad. & Ell. 772; 3 Nev.

trial. On writ of error brought, the Court would no doubt allow an amendment: *Cheese v. Scales* (a).

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Crompton, contra.—It is plain, on the lessor of the plaintiff's own shewing, that the defendants had a right to be in, as to part of the premises, after this ejectment was tried. The agreement gives the defendants a right to hold the house, buildings, and outlet until the 1st of May. It is a fallacy to suppose that there is any such implied contract as has been contended for on the other side. This is a *term*, and not a mere privilege; and if it were, still it would not be a conditional one. The principal part of the demise is to determine on the 2nd of February, but the rest is to continue until the 1st of May, although, perhaps, no notice need be given with reference to it. As to the house, &c., therefore, this notice could not operate until the 2nd of May arrived. And the verdict may be apportioned accordingly. The plea of not guilty is distributive, and raises a distinct issue as to each part of the demise. In *Doe d. Errington v. Errington* (b), where there was but one demise, and the lessor of the plaintiff proved a title as to part only of the lands claimed by him, the defendant had a verdict as to the rest, and it was held that he was entitled to have his costs, as to the part found for him, set off against the costs of the lessor of the plaintiff, under the Rule of H. T. 2 Will. 4, s. 74. And in *Denn d. Burgess v. Purvis* (c), it is assumed that the verdict in ejectment is divisible, and that the lessor of the plaintiff may recover part according to his title. How otherwise is the defendant to obtain his costs, where he is liable only as to a part of the premises? [*Gurney, B.*, referred to *Roe v. Street* (d).]

Then the venire and distringas are clearly wrong in this case. The Court always look to John Doe as being the

(a) 10 M. & W. 488.

(b) 4 Dowl. P. C. 602.

(c) 1 Burr. 326.

(d) 4 Nev. & M. 42; 2 Ad. & Ell. 329.

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plaintiff on the record, and therefore it has been held, that the lessor of the plaintiff cannot release the action: *Doe d. Byne v. Brewer* (a). [Lord Abinger, C. B.—That is no argument to shew that you are entitled to a new trial, for a mere mistake in the venire.] This is not an error which would be amendable, the process not appearing to be between the same parties, or in the same cause: *Crowder v. Rooke* (b). [Lord Abinger, C. B.—The record would shew that John Doe claimed under the same lessor of the plaintiff.] In *Cheese v. Scales*, the distringas was clearly amendable, and therefore the Court refused to interfere, and left the party to his writ of error. [Rolfe, B.—What do you say the judge ought to have done in this case?] He should have refused to try the cause. [Rolfe, B.—That seems a strange reason for granting a new trial of the cause.] The verdict being set aside for the mis-trial, a new trial follows.

LORD ABINGER, C. B.—It is not strictly necessary to pronounce any opinion upon the effect of this notice to quit: whether or not the defendant could say that under this notice the plaintiff was not entitled, on the 3rd of February, to the possession of the house and outlet, as well as of the rest of the premises. It seems that this is an original question; for although it has been frequently determined that a notice to quit may be referred to the period when the main holding has expired, yet there is no case, that I am aware of, where an ejectment has been brought after a notice to quit, admitted to be a good notice as to one part of the premises, but upon a demise laid before the period of entry as to the remainder of the premises. Upon that question I shall not pronounce any opinion until it becomes necessary to do so, though I should be glad to be able to come to a reasonable conclusion upon it; and

(a) 4 M. & Selw. 300.

(b) 2 Wils. 144.

certainly it seems to me that a man has no right to set up in his own defence a contract which he is himself violating. Upon what principle is the tenant to have the privilege of holding over the house and outlet, unless he gives up the land at the proper period? If, by keeping possession of the land, he denies that the plaintiff is entitled to recover, it must be that he denies the plaintiff's title altogether: that he insists upon the demise continuing for the whole premises. If the demise does not continue for the whole, does it continue for any part? It is one entire demise of one farm. If he is to give up at a certain period the land, and at another period the house, and if, when the period comes to give up the land, he refuses to give it up;—if he insists that the demise continues as to the whole by refusing to give up any part according to the contract, can it be said on his part that the landlord is bound to give him the benefit of the contract as to a part, which he says is to operate to enable him to keep possession of the whole? It is unnecessary, however, to pronounce any definite opinion upon this question, because it appears to me that the plaintiff is entitled to a general verdict, if he proves his title to recover any part of that for which he has declared; and that, unless a distribution of the verdict is consented to and arranged at the trial, which in this case was not done, we cannot enter here into the consideration as to the question of costs. In the case that Mr. Crompton cited, of *Doe v. Errington*, the action was brought by the heir-at-law, and the question was, what premises could be recovered by him upon that title. In his bill of particulars he stated certain premises he intended to go for, standing upon distinct titles, some being copyhold, some freehold; and, for aught that appears to the contrary, it might have been arranged at the time of the trial that the plaintiff should have a verdict for the copyhold, and the defendant for the freehold: indeed, that such was the arrangement seems to have been as-

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sumed by Mr. Justice *Coleridge's* decision, (and I think reasonably enough), and the case then became a mere question of costs. Then Mr. *Crompton* urges, "How are we to obtain the costs, in a case where we are not liable as to the whole of the premises?" The answer is, by stating specifically in the consent-rule for what part you mean to defend; and if upon that part you succeed, you will be entitled to the costs. It has been an established rule in actions of ejectment, ever since I have known the law, that when the plaintiff recovers a verdict, although he proves a title to a part only, he may take his verdict generally, unless it is otherwise consented to or arranged at the trial; but it is at his peril what he takes possession of under the execution. The case of *Roe v. Street* is the strongest possible authority for the plaintiff. There A. and B. defended each for a separate part of the premises, and at the trial the plaintiff obtained a verdict against both; but the verdict against A. was afterwards set aside by the Court, and judgment entered for him. B. then applied to the Court to have the verdict limited to that part for which he defended, (which is exactly the present case); but the Court said, "No; the plaintiff will take possession at his peril." I think therefore that there is no pretence for a new trial on that ground.

Then the next question is with respect to the defects in the jury process. Mr. *Crompton* seems to think that this is a case where the venire could not be amended; but that furnishes not a ground for a new trial. He has referred to the distinction between the nominal and the real plaintiff, by shewing that the release of the lessor of the plaintiff has no effect upon the action. The Court does not necessarily take notice that John Doe is not a living person, and that he has not a real interest; and the release from the lessor of the plaintiff is good for nothing, because it does not affect the interest of John Doe, the plaintiff upon the record, and in that respect they

are separate persons. But when it is considered that an action of ejectment is a matter of pure fiction, and a creature of the Court, to meet the purposes of justice, the lessor of the plaintiff is to be considered as the substantial party in the action, though *pro forma* he is not. In this case, the record all the way through shews that John Doe is recovering an interest derived from the lessor of the plaintiff, and it is quite clear from the record itself how the venire ought to have been, and that by mistake the name of the lessor of the plaintiff has been put in, who is in truth the interested party. We can therefore amend by the record itself. Put the ordinary case of a writ, which may be amended, if there is any thing to amend by. Suppose a writ issues in the Christian instead of the surname of the plaintiff, may not the Court amend it? This is in truth a mere clerical mistake, and by no means an unnatural one, and there are abundance of cases where the Court has amended such defects; and Mr. *Crompton* has admitted, that where there is room for an amendment, there is no ground for granting a new trial. We have ourselves acted upon that principle, by refusing a new trial in the case of *Gee v. Swann*. But, even supposing this defect could not be amended, the defendants have a right to their writ of error: and in this particular case, I see no reason why we should give a new trial to save the expense of a writ of error. Indeed, I believe a new trial would cost more than a writ of error; therefore I do not think we shall do any thing but further the ends of justice, by refusing a new trial. The rule must therefore be discharged.

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GURNEY, B.—With respect to the first point, I have known cases occur very frequently, where the lessor of the plaintiff was entitled to part only of the premises, and where he has taken a general verdict upon his own responsibility. When no separation of the premises has

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ROLFE, B.—I am of the same opinion. The only doubt I entertained was whether or not the verdict was to be confined to that portion of the property which was in fact recovered; but I am satisfied that there is no reason for a new trial. Our decision does not exclude the defendants from the taxation of their costs; if they make out that they are entitled to costs in any way, that is still open to them. Upon the other points, I am of opinion with the rest of the Court.

Rule discharged.

May 27.

TODD and Another v. EMLY and Another.

The Middlesex County Court Act (23 Geo. 2, c. 33) does not apply to cases where the cause of action arises within the city and liberty of Westminster.

The 19th section of the 23 Geo. 2, c. 33, provides that in case any action of debt, &c. shall be brought in the Courts of Record at Westminster, and the defendant shall reside in Middlesex, &c., and a verdict shall be found for less than 40s., no costs shall be awarded to the plaintiff, but the defendant shall be entitled to double costs:—*Quære*, whether that section applies to a verdict on a plea collateral to the merits of the action, as a plea *puis darrein continuance* of a release to a joint contractor with the defendants.

ASSUMPSIT for goods sold and delivered. Plea, non-assumpserunt.

This was an action for wine supplied to the Alliance Club, brought against the defendants as members of the committee. On the trial of the cause before *Tindal*, C. J., at the Summer Assizes, 1841, the plaintiffs having called a Mr. Charles Stewart as a witness, who stated, on the *voir dire*, that he was also a member of the committee of the club when the wine was ordered, it was objected that he was incompetent on the ground of his being a co-contractor with the defendants, whereupon a release was executed and delivered to him. The defendants then urged that the release of a joint contractor operated as a discharge of all, and immediately applied for leave to plead the release *puis darrein continuance*: but, it being objected that the plea could not be received after the jury were sworn, the judge reserved the point. The Court having decided that the

plea ought to have been received (a), it was pleaded accordingly: but subsequently, and before issue joined, Stewart cancelled the release, and the plaintiffs replied non est factum, on which issue was joined. On the next trial, in the summer of 1842, the defendants, being unable to produce the release, or give evidence of its contents, owing to a mistake as to the party in whose possession it was, the plaintiffs obtained a verdict: but a rule absolute for a new trial, on the ground of surprise, having been obtained (b), the case was again tried before Lord *Denman*, C. J., at the last Spring Assizes, at Kingston, when the issue on the plea of non est factum was found against the defendants. The plaintiffs put in a copy of particulars of demand delivered under a judge's order, and an admission made by the defendants, that the wines, &c. mentioned in such particulars, were delivered by the plaintiffs at the times therein specified at the Alliance Club, and that the prices charged were fair and reasonable; and upon that evidence the jury found for the plaintiffs, with £194 damages, leave being reserved to the defendants to move to reduce the damages to 1s. In the early part of last term, *Thesiger* obtained a rule accordingly, and cause having been shewn [May 5] by *Petersdorff* against the rule, and *Bovill* having been heard in support of it, the Court made the rule absolute to reduce the damages to 1s., on the ground that there was no evidence at all to charge the defendants.

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Thesiger subsequently obtained a rule calling on the plaintiffs to shew cause why the defendants should not be at liberty to enter a suggestion on the roll that the damages recovered did not amount to 40s., in order to deprive the plaintiffs of costs, and why they should not pay to the defendants double costs of suit, pursuant to the Middlesex County Court Act, 23 Geo. 2, c. 33.

(a) 9 M. & W. 606.

(b) 11 M. & W. 1.

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The affidavit on which the rule was obtained stated, that at the time of the commencement of the suit the defendants were inhabitants of and resident within the county of Middlesex, and liable to be summoned to the county court there; and that the cause of action arose within the county of Middlesex, and not elsewhere. The plaintiffs' affidavits stated that the contract was made, and the cause of action arose, within the city and liberty of Westminster, and not elsewhere.

Petersdorff now shewed cause.—This is an application under the 19th section of the 23 Geo. 2, c. 33, which enacts, "that in case any action of debt or of assumpsit shall be commenced or prosecuted in any of his Majesty's courts at Westminster, and the defendant or defendants at the time of such action brought shall live or reside within the county of Middlesex, and be liable to be summoned to the said county court, and the jury upon the trial of such cause shall find for the plaintiff under the value of 40s., unless the Judge shall in open court certify on the back of the record, that the freehold or title to the plaintiff's land principally came in question, or that an act of bankruptcy came principally in question at such trial; then and in such case no costs shall be awarded to the plaintiff in such action, but the defendant or defendants shall be entitled to and recover double costs of suit." The preamble is important, and recites that "whereas sheriffs in their several county courts hold plea of all personal actions, where the debt or damages do not amount to 40s.; and whereas the proceedings in the county courts in such actions have been found to be vexatious, expensive, and dilatory; for remedy thereof in the county of Middlesex, and for the more easy and speedy recovery of small debts within the said county, be it enacted, &c., that it shall and may be lawful to and for the suitors of the county court of Middlesex, together with the county clerk of the said county in county court

assembled, or the major part of them the said county clerk and suitors so assembled, upon any plaint to be entered in the said county court, in any suit where the debt or damages shall not amount to the sum of 40s., to proceed in a summary way, and from time to time to make such orders or decrees, as shall seem to them, or the major part of them so assembled, to be just and agreeable to equity and good conscience," &c.—The 4th section enacts, "that no person or persons shall be liable to be summoned to the said county court at the suit of any plaintiff or plaintiffs, other than such person or persons as was or were liable to be summoned to the county court of Middlesex before this act was made, and that this act shall not extend to give the said county court any jurisdiction to hold plea of or to hear or determine any action, cause, or suit, other than such action, &c. as the county court of Middlesex might have held plea of by plaint, before the making of this act." The 21st section provides, "that nothing in the act contained shall extend or be construed to extend to the city or liberty of Westminster and the precincts of the same, and so much of the several parishes of St. Clement Danes and St. Mary-le-Strand in the county of Middlesex as are without the city and liberty of Westminster, and also in the precincts of the Savoy adjoining thereto." Now, first, those provisions apply only to causes in which the issues raised involve the existence of a debt or demand, but have no operation in cases like the present, where the action is brought not to try the existence of a debt, but a collateral issue. That was decided in *Welchen v. Le Pelletier* (a), which was an action for money had and received, and in which the defendant pleaded his misnomer in abatement; and it was held that the defendant was not entitled to enter a suggestion on the roll under the Middlesex Act, where a verdict was

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(a) 1 Chit. Rep. 636, n.

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found for 1*s.* damages on that issue, as the act did not apply to an issue of that description. It is evident from the exception in the clause, that the legislature intended to exclude from the jurisdiction of the court all questions which were calculated to raise issues of a complicated nature. Secondly, the act does not apply to cases in which the cause of action arose out of the jurisdiction of the county court. It was not intended to give a jurisdiction beyond that of the old county courts, for the 4th section enacts that no person shall be summoned to the said county court, other than such persons as were liable to be summoned to the county court of Middlesex before that act was made. Now here the plaintiffs' affidavits shew that the cause of action did not arise within that jurisdiction, but that it arose within the city and liberty of Westminster. *Bishop v. Marsh (a)* is an authority in support of this view of the case. There it was stated that the defendant resided within the jurisdiction of the Middlesex county court, and it was contended that he ought to have gone further, and have stated that the cause of action arose within the county. The Court, however, thought, that if the cause of action did not in fact arise within the jurisdiction, it might be stated as an answer by the plaintiff in a counter affidavit; from which it would appear that if it had been stated, as it is in the present case, the defendant's application would not have succeeded.

Thesiger and *Bovill*, contra.—First, the Middlesex County Court Act does apply to a contract entered into within the city and liberty of Westminster. Before the passing of that act there was a county court, which had jurisdiction over all the liberties and franchises within the county, unless they were specially exempted by statute or charter. And

(a) 6 Bing. N. C. 12; 8 Scott, 128.

in the same session of Parliament as the before-mentioned act was passed, another stat. was also passed, (23 Geo. 2, c. 27), establishing a court of requests for the city and liberty of Westminster. By the 6th section of the latter act, it is enacted, "that it shall and may be lawful to and for every resident and inhabitant within the said city and liberty, or the said part of the said duchy aforesaid, and to and for all and every person and persons renting or keeping any shop, shed, stall, or stand, or seeking a livelihood within the said city and liberty of Westminster, or in the said part of the said duchy aforesaid, who now have or hereafter shall have any debt or debts due or owing unto him, her, or them, not amounting to the sum of 40s., by any person or persons whatsoever, inhabiting or seeking a livelihood within the said city and liberty of Westminster, or within that part of the said duchy aforesaid, to apply to the said clerks of the said court, or one of them, who shall cause such debtor or debtors so inhabiting or seeking a livelihood as aforesaid, to be warned or summoned by the said high bailiff or his officer or officers, in the manner therein mentioned, to appear before the said commissioners, who are thereby empowered to make or cause to be made such orders, decrees, judgments, and proceedings, between the party or parties plaintiffs, and his, her, or their debtor or debtors, defendants, touching such debts, not amounting to the sum of 40s., as they shall find to stand with equity and good conscience," &c. And by the 21st section it is enacted, "that no action or suit for any debt not amounting to the sum of 40s., and recoverable by virtue of this act in the said court of requests, shall be brought against any person residing or inhabiting within the jurisdiction thereof, in any other court whatsoever." In *Scotts v. Seager (a)*, it was held that the privilege of not being sued elsewhere than in the county court did not extend to

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persons seeking their livelihood in Westminster, but to inhabitants residents only. In the more recent act of Parliament, 6 & 7 W. 4, c. cxxxvii., for extending the jurisdiction of this court to £5, it is enacted by the 86th section, "that no action or suit for any debt not exceeding the sum of 40s., and recoverable by virtue of this act in the said court of requests, shall be brought against any person residing or inhabiting within the jurisdiction thereof, in any court whatsoever." That continued the provision in the 21st section of the prior act, 23 Geo. 2, c. 27. When the act established a court of requests in Westminster, it did not take away the jurisdiction of the county court of Middlesex, except where the defendant was residing and inhabiting within the city and liberty of Westminster; and the object of the 23 Geo. 3, c. 33, was not to create a new court within the county of Middlesex, with the exception of certain districts, but merely to regulate the proceedings which previously existed. And the effect of the 21st section of the latter act was only to exclude from its jurisdiction cases in which the parties *resided* within the city and liberty of Westminster; it does not exclude from the Middlesex county court those cases where the *cause of action* only arises in Westminster. An exception must be engrafted on the 4th section of 23 Geo. 2, c. 33. The exclusive jurisdiction of the Westminster court of requests only applies where the parties are residing within it. It cannot be that the Middlesex County Court Act was intended to give to the Westminster court of requests a jurisdiction which it did not possess before, which would be the case if the defendant's construction were adopted; viz. that all cases are excluded from the Middlesex County Court Act where the cause of action arises in Westminster, as well as where the parties reside there. The 19th section must be applicable to all persons residing within the county of Middlesex, with the exception of those who reside within the city and liberties of Westminster. The argument on the other

side amounts to this, that, as regards the jurisdiction of the Middlesex county court, Westminster must be considered as out of the county of Middlesex. This case would have originally been within the jurisdiction of the old county court, and the Westminster Court of Requests Act did not take away the jurisdiction of the county court, except where the party resides within the city and liberty of Westminster. Secondly, as to the point of this being a collateral issue, the question in these cases has been, for what amount, and in respect of what, the action is really brought. If the court had jurisdiction over the case originally, it cannot be taken away by a collateral issue arising at the trial. The case of *Welchen v. Le Pelletier* is merely a loose note, and it does not appear how the point arose.

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LORD ABINGER, C. B.—I am of opinion that this rule ought to be discharged. As to the question respecting the collateral issue raised by the plea *puis darrein continuance*, I do not wish to pronounce any definite opinion upon it. The case which has been cited from Chitty's Reports certainly bears some analogy to the present, because, whatever the nature of the action brought, a plea in abatement for misnomer is certainly a plea collateral to the real subject-matter of the action. If that case be any authority, it would go a great way to decide the present, as the same principle will apply here; but it is not necessary to decide that point. As to the principal point, there is a class of cases which have not been adverted to in the argument, which certainly do not fall within these acts of Parliament, namely, where the action for money had and received has been brought to try a right, and the party only recovers nominal damages. In such a case, the Court would not allow the party to enter a suggestion on the record. I remember an important action of that kind being brought to try the right of coal-meters to receive certain fees, where the action was only to recover the sum of 2s.; and another

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action by a rector against the churchwardens. Wherever the action is brought to try a right, though the money recovered is less than 40s., the Court will not grant a rule to enter a suggestion to deprive the plaintiff of costs. But in the present case, I think the proviso in the 21st section of the Middlesex County Court Act, to which our attention has been called, affords a complete answer to this application: that proviso is, "that nothing in this act contained shall extend or be construed to extend to the city and liberty of Westminster." Now, I cannot construe that as referring to the Westminster Court of Requests Act, and not excluding cases where the cause of action arises in Westminster. The argument for the defendants is founded upon conjecture only, for no such meaning appears expressly upon the face of the act. If, however, it really was meant to have that effect, it would have been easy to have inserted a clause in the Middlesex Act, that nothing therein contained shall extend to an act passed at such a time. That would have been a clear exception of all cases included in the other act. Suppose the Middlesex Act had run thus,—“excepting all such parts of the said county as are within the city of Westminster;” then all the clauses would have been governed by those words, and the act would apply to all cases within the county where the parties did not *reside* in Westminster. But here the words of the act are,—“provided that nothing in this act contained shall extend, or be construed to extend, to the city and liberty of Westminster.” In the present case, the cause of action arose in Westminster, and therefore the action ought not to be brought in the county court of Middlesex. We do not deny that the case was within the jurisdiction of the county court at common law, but it is not within the jurisdiction of the parliamentary county court, as it is particularly exempted by the act. The rule must therefore be discharged.

GURNEY, B., concurred.

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ROLFE, B.—We cannot speculate upon the intention of the legislature, when the words of an act of Parliament are express. Mr. *Thesiger* reads the proviso in the 21st section of the Middlesex Act, as declaring that that act shall not extend to parties residing within the jurisdiction of the Westminster Court of Requests Act, that is, to cases where the parties reside in the city of Westminster. But that is not the meaning of the proviso. It must be intended that the proviso is grafted on the preamble, and that the act relates to all the county of Middlesex, except the city of Westminster; and therefore, where the cause of action arises in the city of Westminster, the action ought not to be brought in the county court of Middlesex.

Rule discharged.

PHILLIPS v. VISCOUNT CANTERBURY.

May 27.

A FIERI FACIAS having been sent to the sheriff of Suffolk, directing him to levy £625 17s. 6d., with interest and costs, the sheriff returned that he had levied on all the goods of the defendant which were found in his bailiwick, to the amount of £234 4s.— of which he retained £22 12s. 9d. for his charges, poundage, officers' fees, and other incidental expenses, and held the rest ready to pay over to the plaintiff. It appeared by the affidavits, that the sheriff, instead of selling the goods, had, by agreement with an agent of the execution-creditor, had them appraised and valued, and disposed of them by a bill of sale, and charged the execution-creditor with the charges of the appraisal, amounting to the sum of £9 15s. *Pearson* had obtained a rule calling upon the sheriff to shew cause why

A sheriff who has seized goods under a fi. fa., and disposed of them by appraisal and bill of sale, is not entitled to deduct the expenses of the appraisal and sale; the scale of fees framed under 7 Will. 4 & 1 Vict. c. 55, applying to "sales by auction" only.

Exch. of Pleas, he should not refund the above sum of £9 15s., as improperly deducted out of the proceeds of the sale, this not being one of the charges allowed to be made by the sheriff under the stat. 7 Will. 4 & 1 Vict. c. 55, and the table of fees promulgated by the Court pursuant thereto.

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W. H. Watson shewed cause.—There is nothing either in the statute or the rule of Court to prevent the sheriff from disposing of goods seized under a *fi. fa.* by bill of sale; and in many cases it would be a great advantage to the parties that they should be so disposed of, and it would be unjust that the sheriff should not be paid for his trouble. But, admitting that his claim for those expenses is unfounded, as there is no fee allowed for an appraisement or a bill of sale in the table of fees, the plaintiff should have brought his action against the sheriff, or proceeded by an attachment for contempt under the 3rd section of the statute, which enacts, that any sheriff who shall exact, take, accept, or receive any fee, gratuity, or reward not allowed by the taxing officers, shall be adjudged guilty of a contempt. Here, the sum claimed was a fair and reasonable sum to be allowed, and if it is not allowed, it will oblige the sheriff to put up goods to auction in every case. At all events, this is not the proper remedy.

Pearson, in support of the rule.—The sheriff was bound at common law to execute all writs and sell the goods seized, without making any charge for it; *Woodgate v. Knatchbull* (a): so that, unless he is entitled to it by some statute or rule of Court, this is an overcharge. Now, according to the table of fees framed under the stat. 7 Will. 4 & 1 Vict. c. 55, he is entitled to the expenses of a sale by auction, but there are none allowed for a sale by appraisement. By the table of fees, the sheriff is entitled to

(a) 2 T. R. 158.

a certain per centage "for every sale by auction," but there is nothing said as to an appraisement. And the 2nd section of the statute enacts, that it shall be lawful for sheriffs or their officers "to demand, take, and receive *such fees and no more*, as shall from time to time be allowed by any officer of any of the Courts of law at Westminster charged with the duty of taxing costs in such cases, and under the sanction and authority of the judges of the several Courts." In *Slater v. Haines* (a), it was expressly held that a sheriff is only entitled to poundage under 29 Eliz. c. 4, and to such fees as are allowed by the table of fees framed under 7 Will. 4 & 1 Vict. c. 55, and that, although he be put to extra trouble and expense in making the levy, he cannot claim more.—He also referred to 2 Chitt. Archb. 1275, and was then stopped by the Court.

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Lord ABINGER, C. B.—I am of opinion that this rule ought to be made absolute. I at first thought it would be rather hard for the sheriff not to have his expenses allowed, in a case where he adopted a more advantageous mode of disposing of the goods levied under the execution, than by resorting to a public sale; but the statute is express, that sheriffs are to take no fees, except such as are allowed by the table of fees to be framed by the Judges; and we have no doubt as to our power to interfere in this summary way, without putting the plaintiff to the trouble of bringing an action. However advisable it might possibly be in particular cases to allow sheriffs to have the goods valued at the expense of the execution-creditor, and disposed of by private sale, there is no provision for that purpose in the table of fees, and he is not entitled to take more than is there allowed him. Looking at that table, it is clear that the sheriff is not entitled to charge the expenses of an appraisement, for it has omitted the case where the goods

(a) 7 M. & W. 413.

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are disposed of under a bill of sale; it applies only to sales by auction. It is not too late, however, to apply in order to have it amended. That table was framed with great care by the Judges, attended by the representatives of the sheriffs of the different counties, and if they had made any suggestion on the subject, it would have been attended to. If parties feel themselves insufficiently remunerated, their only mode is to apply to the Judges to alter the table of fees, and allow expenses of this description. This rule must however be made absolute, for the sheriff to return the sum overcharged.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

May 30.

SAXTY v. WILKIN.

Assumpsit.
The declaration alleged, that, in consideration that the plaintiff would buy of the defendant a horse, at and for a "certain price or sum, to wit, the sum of 56*l.* 16*s.*," the defendant promised that the horse was sound. Breach, that he was unsound. Plea, non assumpsit, and a traverse of the unsoundness. At the trial, it was proved that the plaintiff, who was a tailor, agreed to give the defendant for the horse £55, and a new pair of breeches, value 1*l.* 16*s.*:—*Held*, that there was no variance.

ASSUMPSIT.—The declaration stated that, in consideration that the plaintiff would buy of the defendant a certain horse at and for a certain price or sum, to wit, the sum of 56*l.* 16*s.*, the defendant promised the plaintiff that the said horse was sound. Breach, that the horse was unsound. Pleas, non assumpsit, and a traverse of the unsoundness.

At the trial before *Patteson, J.*, at the last Spring Assizes for the county of Essex, it appeared that the plaintiff, who was a tailor, was desirous of purchasing a horse belonging to the defendant, and it was ultimately settled between them that the plaintiff was to have the horse for £55, and a new pair of breeches, value 1*l.* 16*s.* Upon this proof, it was objected by the defendant's counsel that the allegation in the declaration,—“a certain price or sum, to wit, the sum of

56*l.* 16*s.*”—meant so much money, and was not supported by proof of a contract for £55 and a pair of breeches, and that the transaction proved in court was, in part at least, that of a barter, and not a sale. The learned Judge overruled the objection, expressing a strong opinion that the declaration was well supported, and the jury found for the plaintiff for the amount claimed; leave being reserved to the defendant to move to enter a nonsuit. *Platt* having in Easter Term obtained a rule accordingly,

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Thesiger and *M. Chambers* now shewed cause.—This was clearly a contract of sale for 56*l.* 16*s.*, which sum was to be made up by the payment of £55 in cash, and a pair of breeches of the value of 1*l.* 16*s.* If any authority were necessary, the case of *Hands v. Burton* (a) is precisely in point. In that case it was proved that the defendant agreed to sell the horse warranted sound to the plaintiff for 31*l.* 10*s.*, and at the same time agreed that, if the plaintiff would take the horse at that value, he, the defendant, would buy another horse of the plaintiff's brother for 14*l.* 14*s.*, and that the difference only should be paid to the defendant; and it was held that such proof would support a count charging only that, in consideration that the plaintiff would buy of the defendant a horse for 31*l.* 10*s.*, the defendant promised that it was sound, and that in fact the plaintiff did buy the horse *for that price, and did pay to the defendant the said sum, 31*l.* 10*s.** Lord *Ellenborough*, C. J., there said, “The parties agreed to consider the brother's horse as fourteen guineas in their mode of reckoning the payment for the defendant's horse; but still the consideration for the latter was thirty guineas, and the defendant received thirty guineas in money and value.” [*Parke*, B.—And in the present case you merely substitute the pair of trowsers for the brother's horse.]

(a) 9 East, 349.

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Rodwell, contra.—The cases on this subject shew that the consideration for a warranty must always be correctly stated. Now here the proper mode of declaring would have been “for a certain sum of money, to wit, £55, and a new pair of breeches of a certain value, to wit, 1*l.* 16*s.*” There are many cases to shew, that if any part of the consideration be omitted to be stated, it is fatal.

PARKE, B.—It is quite clear that this is an agreement for a certain *price*. The allegation in the declaration is, that the defendant sold the horse to the plaintiff for a “certain price or sum, to wit, the sum of 56*l.* 16*s.*,” and that is supported by proof that the horse was sold for £55 and a pair of trowsers, which were to be considered as equivalent to 1*l.* 16*s.* Perhaps it might have been more proper to have described the contract for so much money and a pair of breeches, but it is clearly a sale for 56*l.* 16*s.* The case of *Hands v. Burton* is expressly in point.

GURNEY, B., and ROLFE, B., concurred.

Rule discharged.

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BREWER v. DEW and Another.

June 12.

TRESPASS.—The declaration stated that the defendants, George Dew and H. Wightwick, broke and entered two dwelling-houses belonging to the plaintiff, and that they continued and stayed therein, making a great noise and disturbance, for the space of ten days next following, and greatly disturbed and disquieted the plaintiff and his family in the possession and enjoyment of the said dwelling-houses: and then also, with force and arms, took and seized divers goods and chattels, to wit, then being in the said dwelling-houses, and in certain parts thereof then used as shops by the plaintiff in the way of his trade and business of a bookseller, and which said goods and chattels then were part of the stock in trade of the plaintiff in the way of his said trade and business, and of great value, to wit, £2000, and converted and disposed thereof to their own use, to wit, under a false and unfounded claim that the defendants were then entitled to seize and take possession of the said goods &c. to enforce the payment of a certain debt then alleged to be due from the plaintiff to the defendant George Dew; by means of which said premises the plaintiff was greatly annoyed, prejudiced, injured, and disturbed in carrying on and conducting his trade and business, and was believed and considered by divers persons, customers of the plaintiff in the way of his said trade, and others, to be incapable, by reason of his poverty and embarrassed circumstances, of carrying on, and to have ceased from carrying on, the same, and to be insolvent and incapable of paying his just debts; and also, by means of the premises, divers persons, to wit, William Henry Maxwell and George Dawes and his family, who then resided in certain rooms and apartments in the said dwelling-house respectively, as lodgers and boarders with the plaintiff, for reward to the plaintiff in that behalf, being, by reason of the premises,

An action of trespass, for seizing and taking the plaintiff's goods, under a false and unfounded claim of a debt, per quod the plaintiff was annoyed and prejudiced in his business, and believed by his customers to be insolvent, and certain lodgers left his house, does not pass to the plaintiff's assignees on his bankruptcy.

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induced to believe that the plaintiff was in needy and embarrassed circumstances, and that the defendants were entitled to seize the goods &c. for monies due from the plaintiff, and that they the said W. H. Maxwell and G. Dawes and his family could not safely remain with their property and effects in the said dwelling-houses of the plaintiff, left the same, and ceased to reside as lodgers or boarders therein or otherwise. The declaration then averred that thereby, and from divers other persons being by reason of the premises prevented and deterred from coming to reside as boarders and lodgers at the said houses of the plaintiff for reward to the plaintiff in that behalf, the plaintiff had lost and been deprived of divers great gains and profits which otherwise might and would have accrued to him, and the credit and the good name of the plaintiff, in the way of his said trade and business, and by reason of the premises, lost and was deprived of divers great gains and profits therein, and was wholly prevented from profitably carrying on the same.

Plea, as to the seizing and taking the goods and chattels in the declaration mentioned, *actionem non*; because the defendants say, that after the commencement of this suit, and after the passing of the 5 & 6 Vict. c. 122 [setting out a trading, petitioning creditor's debt, fiat, appointment of assignees, &c.,] by reason of which said premises, and by force of the statute &c., one C. D. then and from thenceforth, and before the delivery of the declaration in this cause, became and was, and is assignee of the estate and effects of the plaintiff, as such bankrupt, and entitled to claim and demand and sue for the causes of action in the introductory part of this plea mentioned, and each and every of them :—concluding to the country.

General demurrer, and joinder in demurrer.

Peacock, in support of the demurrer.—The question intended to be raised by this demurrer is, whether a right of action in trespass for breaking and entering the plaintiff's

house, and seizing his goods, passes to his assignees on his bankruptcy. And it is submitted that it clearly does not; because the damages in such an action are not confined to the value of the goods, but may be given also for the annoyance and personal injury occasioned to the plaintiff himself; and these damages the assignees could not recover. The bankrupt therefore may sue in such a case, and will hold the damages, when recovered, in trust for his assignees. It was expressly held in *Clark v. Calvert* (a), and *Spence v. Rogers* (b), that a bankrupt's right of action for trespass quare clausum fregit does not pass to the assignees; and this case is not distinguishable in principle.—He was then stopped by the Court.

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Hawkins, contra.—The assignees derive their right to sue for injuries done to the estate of the bankrupt from the stats. 6 Geo. 4, c. 16, and 1 & 2 Will. 4, c. 56. By the 28th section of the latter act, “all the *personal estate and effects* of the bankrupt” vest absolutely in the assignees; and the act is to be construed beneficially for creditors. [Lord Abinger, C. B.—You would not say that an action for assault, or for seduction, passed to the assignees.] No; the former is a tort to the person only; and in the latter damages are given for the injured feelings of the plaintiff, which cannot be recovered by the assignees: *Howard v. Crowther* (c). [Lord Abinger, C. B.—So this is an action for a trespass involving a personal injury and annoyance to the plaintiff.] But the plea is expressly confined to the taking of the goods; the annoyance, by disquieting the plaintiff, &c., if any, is attributable to the breaking and entering the house. [Lord Abinger, C. B.—The taking of the goods implies an inconvenience by the loss of them for a time. *Rolfe*, B.—The declaration states, that persons who lodged in the house left it in consequence.] That

(a) 8 Taunt. 742.

(b) Ante, p. 191.

(c) 8 M. & W. 601.

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is an injury to the personal estate of the bankrupt, by the diminution of his profits, not to his person. It is clear an action of trover would have passed to the assignees. [Lord *Abinger*, C. B.—There the value of the goods would be the measure of the damages, but here the jury may give damages for the loss of the goods, beyond their value.] *Davis v. Oswell* (a) shews that special damage may be recovered in *trover*, if laid. If this action can be maintained, a bankrupt may always sue in case of any mere tort to the personal estate, for which trover would lie, by merely introducing into the declaration some such allegation of personal injury as is laid here, however false. None of the special damage set out in this declaration includes any personal injury in respect of which the plaintiff could recover damages. A plaintiff must have sustained some personal inconvenience in all cases of trespass or trover, but that cannot prevent the right of action from vesting in the assignees. Here the plea is expressly limited to the seizing and taking of the goods, which is purely a damage to the personal estate. [Lord *Abinger*, C. B.—If it had been applied merely to the *value* of the goods, it might be different.] The defendant could not plead to the value in trespass; that would be pleading to the damages, instead of to the wrongful act. Under this declaration, so far as regards the seizing and taking of the goods, the plaintiff could, *primâ facie*, recover only the value. The case of trespass *qu. cl. freg.* is quite different; the land would only go to the assignees in case they elected to take the term.—He cited *Porter v. Vorley* (b), *Hancock v. Caffyn* (c), *Wright v. Fairfield* (d), and *Beckham v. Drake* (e).

Lord ABINGER, C. B.—The substantial ground on which

(a) 7 C. & P. 804.

521.

(b) 9 Bing. 93; 2 M. & Scott,
141.

(d) 2 B. & Adol. 727.

(c) 8 Bing. 359; 1 M. & Scott,

(e) 9 M. & W. 79; 11 M. &
W. 315.

this case is to be decided is this,—whether, on this declaration as it stands, the jury could give vindictive damages, for the seizing and taking of the goods, beyond their value. For the breaking and entering it is admitted they might give damages beyond the amount of the actual injury. Now I think that under this declaration the plaintiff might give evidence to shew that the entering, and the seizure of the goods, were made under a false and unfounded pretence of a legal claim, and that thereby the plaintiff was greatly annoyed and disturbed in carrying on his business, and was believed to be insolvent, and that in consequence his lodgers left him. Might not the jury then give vindictive damages for such an injury, beyond the mere value of the goods? If they might, on this plea they are not precluded from doing so, because the plea goes to deprive the plaintiff altogether of the right of action for the seizing and taking of the goods. I do not say that the defendants might not have limited their plea so as to make it good for this purpose, by stating that, so far as regarded the *value* of the goods, the plaintiff had lost his right of action by his bankruptcy: but upon issue joined on this plea, the jury might have given much larger damages in respect of the *manner* of the seizure, beyond the mere value of the goods. On this ground I am of opinion that the plea is bad, and that there must be judgment for the plaintiff.

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GURNEY, B., concurred.

ROLFE, B.—I am of the same opinion. I quite agree as to the propriety of the test applied to this case by my Lord; and I not only think that vindictive damages might be given here, but also that there is special damage, properly alleged, in this declaration, for which the assignees could not have maintained an action. The plaintiff complains not only that the defendants took his goods, but that they did so under a false and pretended claim of right; that he

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was thereby much annoyed and prejudiced in his business, and believed to be insolvent; and that, by means of the premises, certain lodgers, being induced to believe that he was in embarrassed circumstances, and that the defendants were entitled to seize the goods for a debt, quitted his house. That is an allegation of special damage in respect of which the jury might give damages, and not one for which the assignees could have a right of action, although the money when recovered might belong to them. This plea therefore goes too far: I do not say whether it might not have been so framed as to be a defence, if pleaded to a part only of the cause of action; but as it is, it goes too far, in being altogether in denial of all damages by reason of the seizing and taking of the goods.

Judgment for the plaintiff.

FORBES v. PEACOCK.

May 31.

A testator, after directing all his just debts to be paid, and bequeathing certain personal estate to his wife for life, devised a freehold house to her "for her natural life, with liberty to sell it in case a good offer is made, and invest the proceeds of it in the £5 per cent. stock, for her benefit during her life." And in a subsequent part of the will he desired that, "at the death of his wife, the residue of his estate might then be collected, including the proceeds of the house and lot, if not previously sold, to be then disposed of to good advantage, to be divided as follows," &c. He appointed his wife, the plaintiff, and one R. C., to be executrix and executors of his will. The plaintiff and the widow proved the will. R. C., the other executor, died in the lifetime of the widow. After the death of the widow, the plaintiff, the surviving executor, entered into a contract with the defendant for the sale of the house:—*Held*, that, whether there were or were not debts unpaid, and whether it was or was not uncertain whether any debts remained unpaid, the plaintiff had a power to sell and convey the house in fee-simple.

THE following case was sent by the Vice-Chancellor of England for the opinion of this Court:—

John Fisher Throckmorton, at the time of making his will, and at his death, was seised in fee-simple of a messuage, garden, and other hereditaments, in Hornsey Lane, in the county of Middlesex, and by his will of the 18th of March, 1815, devised as follows:—"All my just debts to

Quere, whether the widow could have sold the house in her lifetime, without the concurrence of the executors.

be paid, and all debts. First, I give and bequeath to my dear wife, Elizabeth Throckmorton, all plate, jewels, wines, household furniture, monies at the bankers, or elsewhere, belonging to me, and all stock in the funds, partly during her natural life, and partly at her own disposal, as shall hereinafter be provided for. Secondly, in order that she my aforesaid dear wife, Elizabeth Throckmorton, may have wherewithal to support herself comfortably, I wish her to lay out in government annuities for her life £2500 sterling, half in the Consols, and half in the Reduced £3 per Cents., which will bring her payments in quarterly. The remainder of my property I desire may be invested in the £5 per cent. stock, for her benefit during her natural life. Thirdly, the house and ground on which it stands, garden, and all thereto belonging, being now my own freehold property, paid for, and without incumbrance, I give to her for her natural life, with liberty to sell it in case a good offer is made, and invest the proceeds of it in the £5 per cent. stock, for her benefit during her life; or she may let it on a running lease for seven or fourteen or twenty-one years, the said lease to expire and terminate at the first of the three of the above periods that may happen subsequent to her demise. Out of my estate, the monies so directed to be invested as aforesaid, or any part of them, I give and bequeath, at the death of my said dear wife, to Mary May, great niece of my said dear wife, provided she conducts herself, as she has always hitherto done, to her aunt's and my satisfaction, £1000 for her sole use and benefit; and also interest of £1000 £5 per cent. stock, during her the said Mary May's natural life. Fourthly, should the aforesaid Mary May die before her aunt, Elizabeth Throckmorton, then the £1000 left as above for her sole use and benefit is to be with the rest of my remaining property, to form a residuary fund, to be disposed of as hereinafter to be named at the death of my aforesaid wife: but in case of her the said Mary May's decease, as above said, before

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that of her aunt Elizabeth Throckmorton, then and in that case only, I give, at the death of Elizabeth Throckmorton, the interest of the £1000 £5 per cent. stock spoken of as aforesaid to Mary Graham and Eliza Graham, daughters of my late good friend and brother-in-law, Joseph Graham of Harwich, jointly and equally, or to the survivor of them during their lives, and at their deaths to be divided with the residuary property as above spoken of. Fifthly, I desire that, at the death of my dear wife Elizabeth Throckmorton, the residue of my estate may then be collected, including the proceeds of the house and lot; if not previously sold, to be then disposed of to good advantage, and divided as follows:—My sister Sarah Foreman, of Freehold, Monmouth county, state of New Jersey, in America, has four children; and my brother Samuel Throckmorton, deceased, has left three children, perhaps four; but to them, be they seven or be they eight, I give and bequeath all the residue of my property as aforesaid mentioned, to be equally divided, share and share alike, or to the survivors of them. Sixthly, on the decease of the aforesaid Mary May, or of Mary Graham and Eliza Graham, whichever or whoever of them shall have the benefit and receive the interest of the £1000 £5 per cent. stock as aforesaid, the principal is then to revert to the residuary fund as aforesaid, and to be divided therewith. Seventhly, whatever property may be willed to me by my dear mother Caroline Throckmorton, or by whomsoever, I give it to my aforesaid dear wife during her life, and at her death to form part of the residuary fund, as before mentioned, and to be divided at her death with the same. I appoint my dear wife to be my executrix, and I request the favour of my good friends, John Hopton Forbes, Esq., of Ely-place, Holborn, and Robert Cooper of Guildford, will, jointly with my aforesaid dear wife, become my executrix and trustees to this my will."

The testator died in 1815, leaving his wife and the executors him surviving. Mr. Forbes and the testator's widow

proved the will. The widow died in April, 1840, leaving Forbes her surviving. The other executor, Cooper, died previously. Forbes having, in May 1840, put up the messuage, &c. for sale, the defendant Peacock, who became the purchaser, objected to the title, on the ground that it did not appear whether the plaintiff sold the messuage in his character of executor, and for the purpose of paying the debts of the testator, or whether any debts remained unpaid, or whether he sold as trustee under the will, and for the purpose of distributing the proceeds of the sale amongst the parties beneficially entitled. A suit was afterwards brought in the Court of Chancery by the plaintiff against the defendant, for the specific performance of the agreement to purchase.

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The questions for the opinion of this Court are: first, whether the plaintiff, under the testator's will, had power to sell the said hereditaments, and convey the same to the defendant in fee-simple, in case the debts of the testator remain unpaid. Secondly, whether the plaintiff has such power, in case it is uncertain whether any debts of the testator remain unpaid. Thirdly, whether the plaintiff has such power, in case no debts of the said testator remain unpaid.

James Parker, for the plaintiff.—All the three questions proposed ought to be answered in the affirmative. Under this devise, the plaintiff has power to sell the houses, and the proceeds of the sale are equitable assets, to be applied and distributed by him. The effect of throwing the real and personal estate into one fund, on which the legacies are chargeable, has made the real estate liable: *Cole v. Turner* (a). And the same parties being appointed executors and trustees, one of the duties of the trustees is the sale of the real estate. In *Tylden v. Hyde* (b), where the

(a) 4 Russ. 376.

(b) 2 Sim. & Stu. 238.

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testator directed his real and personal property to be sold and divided among his sisters, it was held that a power to sell the real property was implied. In this very case of *Forbes v. Peacock* (a), when before the Vice-Chancellor of England, in August 1840, his Honor decided, on the authority of *Ward v. Devon* (b), that the plaintiff, as the surviving executor, had power to sell the house and to give a receipt for the purchase-money. In Viner's Abr. "Devise" (2 c), pl. 1 (c), it is thus stated:—"Devise of lands to be sold for payment of his debts. It shall be sold by his executors, and the naming of his executors is sufficient." And in pl. 2, it is said, "Where lands were devised to be sold, and the monies to be distributed to several persons, and no person was named to sell, there, by the consent of counsel, it was decreed that the executors should sell." The power goes with the office: Chan. Cas. 179. In an anonymous case, 2 Leon. 223, case 276, such power was held to be executable by the survivor. And in another anonymous case, 3 Dyer, 371 a, pl. 3, where A. devised all his lands to B., "except a manor, which I appoint to pay my debts," and made two executors, it was held, that one having died, the other might "sell the manor to pay the debts." So a power by implication may be exercised by one executor surviving: 2 Leon. 220, case 276. In 1 Sugden on Powers, 138, it is said, "It appears, therefore, to be settled, that a power in a will to sell or mortgage, without naming a donee, will, if a contrary intention do not appear, vest in the executor, if the fund is to be distributable by him, either for payment of debts or legacies;"—thus assuming that the executor is the person who has the power of sale. And, even if the will had been silent about debts, the implication of law would be the same, for in *Tylden v. Hyde* and *Ward v. Devon* nothing was said about debts.

(a) 11 Sim. 152.

his own MS. ; p. 160.

(b) Which he there stated from

(c) Vol. 8, fo. 468.

It was the duty of the executors to sell for other purposes than the payment of debts, but when the land is sold, it is applicable to all the purposes for which the personal estate is liable. And here there was a direction to pay debts; but that does not alter the law. [Lord Abinger, C. B.—Would not the purchaser be bound to look to the application of the purchase-money?] No; the purchaser would be discharged by payment of the purchase-money to the trustee: *Johnson v. Kennett (a)*, *Eland v. Eland (b)*.

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Secondly, the next point is, whether this power of sale survives, and can be executed by the surviving executor. In Co. Lit. 113. a., this very case is put, and it is said: "But if a man deviseth lands to his executors to be sold, and maketh two executors, and the one dieth, yet the survivor may sell the land; because the state so the trust shall survive." In Sugden on Powers, 144, it is said: "Mr. Hargrave has endeavoured to establish, that, where the power is given to executors, or to persons nominatim in that character, the survivor may sell, as the power is given to them *ratione officii*; and as the office survives, by parity of reason the authority should also survive. And the liberality of modern times will probably induce the Courts to hold, that, in every case where the power is given to executors, as the office survives, so may the power." [Rolfe, B.—Where the power to the executors to sell arises by implication, the power to the survivor to sell will arise in the same way.] Then the executors have power to sell, whether there are debts or not.

J. L. Bird, contra.—The executor has no power of sale. The question is one of intention. The testator's object was that his estate should be distributed amongst the parties entitled, and never come to the hands of the executors.

(a) 3 Myl. & K. 624.

(b) 4 Myl. & Cr. 420.

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And in *Beniham v. Wiltshire* (a), it was held that executors have only power to sell the real estate where it is expressly given, or necessarily to be implied, from the produce being to pass through their hands in the execution of their office. The authorities quoted on the other side have no application to this case, because they proceeded on the ground, that the executors, having power to sell the personal estate, had the same power over the real. The words "the remainder of my property," mentioned in the second clause of the will, mean what remained after payment of debts, which was intended by the testator to be a clear fund for the benefit of the widow during her life, and after her death for the residuary legatees. And the fifth clause provides, that at the death of his wife the residue of his estate may then be collected, including the proceeds of the house and lot, and, if not previously sold, to be then disposed of and divided as therein mentioned. The party who took the estate on the death of the widow, subject to the legacies, namely, the heir-at-law, is the party to pay the legacies, and not the executors. Where legacies are given payable out of personal estate, they are payable by the executors; but when they are payable out of the real estate, the executors have nothing to do with the payment of them. What was said by the Master of the Rolls, in giving judgment in *Keeling v. Brown* (b), is applicable to this case:—"Here is no charge of the debts upon the real estate; but a mere direction to the executors to pay the debts, without giving them any other fund than the personal estate out of which they can fulfil that duty. There is no devise, no trust in them, of the real estate, which is otherwise disposed of. I cannot, with all the disposition I always feel to give such a construction to wills as shall make testators honest, construe this into a charge upon the real estate." There was

(a) 4 Madd. 44.

(b) 5 Ves. 361.

clearly no intention on the part of this testator to postpone the payment of his debts until after the death of his wife; and if there were, the will would be within the statute against fraudulent devises.

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Secondly, if a power was given to the plaintiff and the other executors to sell at all, it was not given to them in their character of executors, but as trustees, for the widow was to sell with them; and if so, the power was determined by the death of Cooper, the other executor; for the surviving trustee could not sell. That was expressly decided by *Townsend v. Wilson* (a). It could only be executed by the two. And if the object for which the power is created is unattainable, the power ceases. Then, as to the third question, if there were no debts remaining unpaid, there could be no such power; and if the power did originally exist, it is gone. *Mortlock v. Buller* (b) is in point. There it was the impression of the Vice-Chancellor that, if there were no debts, the power of sale no longer existed (c).

Parker replied.

LORD ABINGER, C. B.—It appears to me, upon the authority of the cases cited by Mr. *Parker*, that, where a power is given to sell property for the purpose of either paying debts or legacies, or of converting them into a residuary fund, that power must from its nature belong to the executors. The estate no doubt in point of law descends to the heir-at-law, subject to the power to sell; but the heir-at-law is not bound to make any distribution; that is the duty of the executors. The argument which arises as to debts arises also upon a question as to the real estate; therefore, let us look at the matter without encumbering it with that. Suppose nothing were stated about debts, who is the person finally to distribute the estate? All the money invested must be invested in the

(a) 1 B. & Ald. 608. (b) 10 Ves. 292. (c) See *Jurist* for 1842, p. 478.

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names of the executors. The persons who are entitled to the residuary fund must be satisfied by the executors; no other person is bound to distribute it amongst them. Then the executors being the persons who are to distribute it, what are they to do? Why the house, if it be not sold during the wife's lifetime, is to be disposed of to the best advantage, and the proceeds are to be divided; so that the house is to form part of the residuary fund, and is to be mixed up with the personal estate, of which the executors have the admitted distribution;—it is to form part of the subject-matter which they have to divide among the persons to whom the property is to be divided.

There may be some doubt in this case whether the wife alone had power to sell. By the words of the will she had liberty to sell, but I doubt very much whether a purchaser would have consented to take the estate upon her sale only, unless the other executors had joined. However, assuming she had the power to sell during her lifetime, this is a power which attaches to the executors after her death. If the heir-at-law is to do it, it must be done by the sanction of the Court of Chancery; but is he to receive the money, and not to be bound also to execute the trusts of the will? And there is a circumstance undoubtedly in this will of some weight; these executors are also mentioned as trustees, with regard to the real estate which is to be sold. That seems very much like a declaration that they are to be trustees to receive the money for the benefit of the parties entitled to it.

However, upon the weight of the authorities, it appears to me that the executors have power to sell, and that the wife had only a life interest.

GURNEY, B., concurred.

ROLFE, B.—I am of the same opinion. It is to be observed, that in this case no power is given in express terms;

the power, therefore, is a power to arise by implication of law: and it does arise by implication of law, because the fund to be produced by the sale is to be distributed in a way in which the executors alone can distribute it; and therefore all question as to survivorship is out of the case, because the same implication which gives it to two executors, gives it to one, for the purpose of distributing the fund in the way in which it is directed to be distributed by both.

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Looking at the first part of the will, I have not any doubt that it was the intention of the testator to charge the debts upon the real estate. And in some one of the cases, I recollect it has been said that the Court are so anxious to find out that intention, that if a party merely talks of his debts, they will imply that they are intended to form a charge upon his real estates; as if a man said, "I direct all my just debts to be paid," that would amount to a charge; but if he said, "I direct all the debts due to me at the time of my decease to be collected," that would vary the case. But that does not at all vary the duty—they can only be collected by the executors. But then it may be said, the wife has the property for her life, with liberty to sell it. I concur with my Lord, that it is a doubtful point, whether singly she has power to sell; but if she concurs with the other executors, it may be sold in her lifetime. It is clear, whatever the power of sale, the money is to come to all three of them, because it is to be invested for her benefit; and that means, not that it is to be invested in her name, but in the names of those who are securities during her life for those who are afterwards entitled. Then there is a legacy of £1000 to her; and, if she dies, the £1000 is, with the rest of the testator's remaining property, to form a residuary fund, to be disposed of as in the will is directed. That is the way in which the residuary fund is to arise, and that fund includes the debts to be collected, and the proceeds of the house. Nothing is more clear than that the legacies form a charge upon this general fund, and that

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the real estate ought to be treated just as if it were personal property. Sometimes these cases are involved in doubt and obscurity, but this is one in which there is very little doubt indeed.

The questions sent to us by the Vice-Chancellor must therefore be answered in the affirmative.

The following certificate was afterwards sent:—

“We have heard this case argued by counsel, and have considered the same; and we are of opinion, that, whether there are or are not debts unpaid, and whether it is or is not uncertain whether any debts remain unpaid, the plaintiff has a power to sell and convey the hereditaments mentioned in the case to the defendant in fee-simple. Dated this 1st day of June, 1843.

“ABINGER.

“J. GURNEY.

“R. M. ROLFE.”

EDWARDS v. BAUGH.

May 31.

ASSUMPSIT.—The declaration stated, that before and at the time of the making of the promise by the defendant hereinafter in this count mentioned, to wit, on &c., certain disputes and controversies were pending between the plaintiff and defendant, as to whether or not the defendant was indebted to the plaintiff in, to wit, the sum of 173*l.* 2*s.* 3*d.*, for money before then lent to and paid for the defendant by the plaintiff, at her request, and for interest upon and for the forbearance by the plaintiff, at the defendant's request, of monies before due and owing from the defendant to the plaintiff for divers long spaces of time elapsed, and for money found to be due from the defendant to the plaintiff on an account then stated between them; and thereupon heretofore, to wit, on the day and year last aforesaid, in consideration that the plaintiff, at the request of the defendant, would then promise the defendant not to sue the defendant at any time thereafter for the recovery of the said sum of, to wit, 173*l.* 2*s.* 3*d.*, so in dispute between the plaintiff and defendant as aforesaid, or any part thereof, or any damages in respect thereof, and would then accept of and from the defendant the sum of, to wit, £100, in full satisfaction and discharge of the same, and every part thereof, and all damages in respect thereof, he, the defendant, then promised the plaintiff to pay him, to wit, the sum of £100, within a reasonable time then next following, in such satisfaction and discharge; and the plaintiff avers that he, confiding in the said promise of the defendant, did then promise the defendant not to sue the defendant at any time thereafter for the recovery of the said sum of, to wit, 173*l.* 2*s.* 3*d.*, so in dispute between the plaintiff and de-

In an action of assumpsit, the declaration stated, that disputes and controversies were pending between the plaintiff and the defendant, as to whether or not the defendant was indebted to the plaintiff in, to wit, the sum of 173*l.* 2*s.* 3*d.*, for money lent to and paid for the defendant by the plaintiff; and thereupon, in consideration that the plaintiff would then promise the defendant not to sue him at any time for the recovery of the said sum so in dispute between them, and would accept from the defendant the sum of £100, in full satisfaction and discharge of the same, the defendant promised the plaintiff to pay him the sum of £100 within a reasonable time:—Held, that the declaration was bad, as not shewing a sufficient consideration for the promise; there being no allega-

tion of any debt being due, but merely that a dispute and controversy existed respecting it.

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defendant as aforesaid, or any part thereof, or any damages in respect thereof, and that he would then accept of and from the defendant the sum of, to wit, £100, in full satisfaction and discharge of the same and every part thereof, and all damages in respect thereof; and although a reasonable time from the time of the making of the promise by the defendant, to wit, the day and year last aforesaid, had elapsed long before the commencement of this suit, to wit, on the day and year last aforesaid, of which the defendant then had notice; and although the plaintiff hath at all times, from the making of the promise by the defendant in this count mentioned to the commencement of this suit, been ready and willing to accept the said sum of, to wit, £100 of and from the defendant, in such full satisfaction and discharge as aforesaid, of which the defendant hath always had notice; and although the plaintiff hath not at any time sued the defendant for or in respect of the said sum of, to wit, 173*l.* 2*s.* 3*d.*, or any part thereof, or any damages in respect thereof, &c., yet &c.:—[Breach, non-payment by the defendant of the said sum of £100, or any part thereof.]

General demurrer, and joinder in demurrer.

The defendant's points marked for argument were:—That there is no sufficient consideration, for the defendant's promise; either, first, in respect of the forbearance to sue, because, although forbearance to sue, when there is a well-founded claim, or the giving up of a suit actually commenced, where the claim is fairly litigable, may be a sufficient consideration for such a promise, the declaration here neither shews that there was a debt or claim which could have been enforced, nor that the plaintiff had commenced an action, or taken any step to enforce it, or was even intending to do so. Nor, secondly, in respect of the promise of the plaintiff to take £100 in satisfaction, because it does not appear that any thing was owing from the defendant to the plaintiff, much less that

more was owing, or that there was any fair or reasonable doubt whether more was owing or not; that there was consequently, so far as appears, neither benefit to the defendant, nor detriment to the plaintiff. The defendant will also contend, that the promise of the plaintiff not to sue and to take £100 in satisfaction, was not binding upon him, being an agreement to accept a less sum in satisfaction of a greater.

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The plaintiff's points were,—that the declaration discloses a sufficient consideration to support the promise laid therein, inasmuch as the avoiding litigation by a settlement of claims of right in controversy, is a sufficient consideration to support a promise, and that it makes no difference that the count shews, as the consideration for the promise of the defendant therein laid, a promise by the plaintiff partly executory, as a promise binding upon a plaintiff is in law a sufficient consideration to support a promise by a defendant.

Kelly, in support of the demurrer.—The declaration is bad. It states no sufficient consideration for the defendant's promise to pay the £100, for it does not shew that any debt was due from the defendant to the plaintiff, or that any suit was pending, the termination of which would be a benefit to the defendant, or any detriment to the plaintiff. An undertaking not to sue, or forbearance to sue, is no consideration, where there is no legal demand or cause of action. It is not sufficient that disputes and differences existed between the plaintiff and defendant, for such an allegation would be satisfied by proof that the plaintiff made an unfounded claim, which the defendant wholly denied. There is nothing to shew that the plaintiff was entitled to maintain any action whatever. The old cases establish that the forbearance of a suit, where the party is not liable, is not a good consideration. *Tooley v.*

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Windham (a), *King v. Hobbs (b)*. That doctrine was first broken in upon in *Longridge v. Dorville (c)*, where it was held that the giving up a suit, instituted to try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum. But that case is very distinguishable; for there a suit had been actually instituted for the purpose of trying a doubtful question, and a ship had been delivered up which might otherwise have been detained. But *Holroyd, J.*, there says, "If a person is about to sue another for a debt for which he is not answerable, the mere consideration of forbearance is not sufficient to render him liable." Here no suit has been instituted, and no liability is shewn. It is not even stated that the plaintiff had any reason at all to believe that he had a cause of action against the defendant. Besides, the acceptance of £100 would be no satisfaction for a claim of 173*l.* 2*s.* 3*d.*, if that were really due.

J. Henderson, contra.—The consideration alleged is sufficient. The circumstance of an action being brought or not makes no difference. If there be a *bonâ fide* claim, which is forborne to be put in suit at the request of the defendant, that is enough. The allegation here in substance is, that the plaintiff had made a claim against the defendant for a certain amount, which the latter had denied to be due, and thus a dispute existed between them, and the defendant agreed, in consideration that the plaintiff would forego his claim for 173*l.* 2*s.* 3*d.*, to pay him a definite sum of money of a smaller amount. Had the declaration averred that the defendant was actually indebted to the plaintiff in 173*l.* 2*s.* 3*d.*, and that the plaintiff had agreed to take £100 in satisfaction of that larger sum, it would have been bad on the face of it. The abandonment of the right to sue for the unascertained

(a) Cro. Eliz. 206.

(b) Yelv. 26.

(c) 5 B. & Ald. 117.

amount is a good consideration for the promise. [Lord Abinger, C. B.—That may be true where the question is only as to the *amount* of a debt; but must not the existence of some actual debt be shewn, as a foundation for the promise?] It is submitted that, there being a claim, and it being doubtful what is the amount due, or even whether any thing is due, that is enough. In *Wilkinson v. Byers* (a), where an action was pending for an unliquidated demand, the defendant's agreeing to pay a fixed sum in lieu of the plaintiff's claim was held a good consideration for the plaintiff to stay proceedings and pay his own costs. [Lord Abinger, C. B.—There an action had been brought, and there was a good consideration for the plaintiff's agreeing to discontinue it. *Rolfe*, B.—Is not the plaintiff bound to shew that there are at least reasonable grounds for believing that something is due to him from the defendant?] The parties have here constituted themselves the judges whether there was any thing due or not, and the legality of a claim to some amount is admitted by their agreement. The relinquishment by the plaintiff of his right, and a corresponding benefit derived by the defendant thereby, is a sufficient consideration.

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Kelly, in reply, was stopped by the Court.

LORD ABINGER, C. B.—The question in this case is, whether there is on the face of this declaration a good consideration for the promise alleged; and I am of opinion that there is not. Mr. *Henderson* has treated the words used in the declaration, as if they implied that a reasonable doubt existed between the parties as to the existence of a debt due from the defendant to the plaintiff; but the declaration does not shew, either expressly or by implication, any

(a) 1 Ad. & Ell. 106; 3 Nev. & M. 853.

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thing of that kind ; it only alleges that certain *disputes* and *controversies* were pending between the plaintiff and the defendant, whether the defendant was indebted to the plaintiff in a certain sum of money. There is nothing in the use of the word "controversy," to render this a good allegation of consideration. The controversy merely is, that the plaintiff claims the debt, and the other denies it. The case might have been different, if the declaration had said, "whereas the defendant was indebted to the plaintiff in divers sums of money, for money lent, and also on an account stated;" that a dispute arose as to the *amount* of the debt so due; and, in order to put an end to all controversies respecting it, it was agreed that the plaintiff, in consideration of receiving £100, should not sue the defendant in respect of his original claim. In that case the plaintiff would have been bound to prove at the trial the existence of a debt to some amount; he might not, indeed, be bound to prove the full amount, but simply to shew such a claim as to lay a reasonable ground for the defendant's making the promise: whereas, in the present case, he would not have to prove any thing beyond the fact that there had been a dispute between himself and the defendant as to the existence of a debt. A man may threaten to bring an action against any stranger he may happen to meet in the street. Where an action is depending, the forbearing to prosecute it is a sufficient consideration for a promise to pay a certain sum of money; for, besides other advantages, the party promising would save the extra costs which he would have to pay, even if he were successful.

GURNEY, B., concurred.

BOLFE, B.—I am of the same opinion. Mr. *Henderson* lays down the proposition much too broadly—that if a party forbears to do something which he might have done,

that forbearance would be a good consideration for a promise; so that, if it had appeared on the face of the declaration that nothing was due to the plaintiff, his forbearance to sue would even then be a consideration. I cannot subscribe to that. I think the plaintiff is bound to shew a consideration, in the shape of something either beneficial to the opposite party, or detrimental to himself.

Resp. of Pleas,
1843.

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Judgment for the defendant.

RUSSELL v. LEDSAM and Others.

CASE for the infringement of a patent for an alleged improvement in the manufacture of tubes for gas, and other purposes, which patent had been originally granted in February 1825, to one Cornelius Whitehouse, and by him assigned to the plaintiff, by whom it was renewed in February 1889. To this declaration the defendant pleaded, first, that the said C. Whitehouse was not the true and first inventor; thirdly, that the invention was not, at the time when the said letters patent were granted, a new invention; eighthly, that the report of the Judicial Committee of the Privy Council, and the said letters patent thereupon, were respectively procured by fraud, covin, and misrepresentation.

June 1.

To an action for the infringement of a patent, the defendant pleaded; 1. That the patentee was not the true and first inventor; 2. That the invention was not, when the letters patent were granted, a new invention; 3. That the report of the Judicial Committee of the Privy Council, and the letters patent thereupon, were procured by fraud, covin, and misrepresentation:—*Held*, first, that the notice of objections delivered under 5 & 6 Will. 4,

The following notice of objections was delivered with these pleas, pursuant to 5 & 6 Will. 4, c. 83, s. 3:—
“Take notice, that the defendants mean, on the trial of this cause, to rely on the following objections to the validity of the patent in the declaration mentioned: first,

c. 83, s. 5, need not state *who* the first inventor was, or under what circumstances the invention had been previously used.

Secondly, that if the defendant objects that the patent is not new, he should specify whether he objects to the patent generally on that ground, or to part only, and if so, to what part.

Thirdly, that the notice ought to state the species of fraud, covin, and misrepresentation by which the patent was procured, on which he intends to rely.

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that the said Cornelius Whitehouse was not the true and first inventor of the alleged improvements in manufacturing tubes for gas and other purposes; secondly, that the said alleged improvements in manufacturing tubes for gas and other purposes, were not, at the time of the granting of the letters patent in the declaration first mentioned, new; thirdly, that the said second letters patent, and the report of the Judicial Committee of the Privy Council, whereon the said letters patent were founded, were obtained by fraud and misrepresentation.

Webster, in Easter Term last (April 28), applied for a rule calling upon the defendant to shew cause why he should not deliver further and better particulars of his objections.—The stat. 5 & 6 Will. 4, c. 83, s. 5, enacts, “that in any action brought against any person for infringing any letters patent, the defendant, on pleading thereto, shall give to the plaintiff a notice of any objections on which he means to rely at the trial of such action;” and the question is, whether the objections which have been delivered in the present case are sufficiently specific, within the intention of the statute. It has been held that the objections delivered must not be a mere echo of the pleas, but that they ought to specify the nature of the defences intended to be raised. *Fisher v. Dewick* (a), *Neilson v. Harford* (b). Applying that principle to the present case, these objections are not sufficient. The first is merely in the language of the plea, that Whitehouse was not the true and first inventor of the alleged improvements; it ought to have gone further, and stated who the true and first inventor was. So also, as to the second objection, it should not merely have said that the improvements were not new, but have stated facts which tended to shew that they were not new; as that they had appeared in certain books,

(a) 4 Bing. N. C. 127; 6 Scott, 587. (b) 8 M. & W. 822.

or had been before used and applied by other persons. *Exch. of Pleas, 1843.*
 [Parke, B.—In *Bulnois v. Mackenzie* (a), Tindal, C. J., said it was open to doubt, “whether, under the words *notice of objection*, we can require the defendant to furnish the names of those who are alleged to have used the plaintiff’s invention;” and the Court rescinded an order requiring the defendant to furnish the names. And in *Heath v. Unwin* (b), we said that you must specify what part of the invention had been used before, but we intimated that it was not necessary to give the names. Those decisions seem to be authorities against your position.] The case of *Bulnois v. Mackenzie* has been overruled by the more recent case of *Jones v. Berger* (c), in which the Court of Common Pleas held that an objection, which stated that the plaintiff’s alleged invention had been previously published in two specifications (which were named), and also by other persons in other books and writings, was insufficient, for not stating the particular books and writings. And the general practice has been in accordance with that. In *Galloway v. Bleaden* (d), the names were given; and in *Crane v. Price* (e), the names of the places where the invention had been used were specified. [Alderson, B.—When you ask for the names of the parties who have used the invention, are you not requiring to be furnished with the statement of the evidence in the brief?] It is a very different thing to ask for a statement of what the objection is, and for that which is the evidence of the objection. Then, as to the objection on the plea of fraud and misrepresentation, the notice should have shewn specifically what was the species of fraud on which the defendant relied; as, for instance, whether it was that the letters patent had been obtained by misrepresentation, or by bribing some officer of the Crown. It ought to be shewn what were the particulars of the fraud of which the

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(a) 4 Bing. N. C. 127; 5 Scott, 419.

(b) 10 M. & W. 684.

(c) Webster, P. C. 544.

(d) Ibid. 522.

(e) Ibid. 379.

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defendant complains, or what were the misrepresentations. [Parke, B.—Yes, I think they ought to specify the nature of the fraud in some way, and in what respect the invention was not new, or generally as not being a new invention; but I think it will be necessary to consider the case of *Jones v. Berger*.]

J. Henderson shewed cause in the first instance.—If the present application were granted, it would be attended with the greatest inconvenience, and the effect of it would be to overturn the rules of pleading, by compelling a defendant to expose his case, and make the other side acquainted with the nature of the evidence he intends to adduce in support of it, and in many instances its effect might be to cast the burthen of proof on the wrong party; as, if a defendant were required to state who the first inventor was, the onus might be thrown on him of negating the plaintiff's right, instead of compelling him to prove his case. Besides, in some cases it would be impossible to afford the information required; as where the invention is of a complicated nature, or of great antiquity, or where there is a doubt as to who the first inventor was. It may be practicable in some cases, where the defendant in his plea discloses new facts which were not before mentioned, but here he merely denies the affirmative allegations in the declaration. The statute only requires that the defendant shall give to the plaintiff "*notice* of the objections on which he means to rely;" an expression which is well understood in practice to signify a general intimation of the line of proof intended to be adduced, and not a precise statement of the evidence to be given; which latter is what the plaintiff here appears to require. [Parke, B.—The notice of objection as to the fraud is too general. You must specify the particular species of fraud. Alderson, B.—You may plead the fraud generally, but you ought to specify in the notice the particular species of fraud.]

Webster, in reply, relied upon *Jones v. Berger* (a), and cited also *Lewis v. Marling* (b), as shewing that the issue of true and first inventor was different from the issue of the invention being used by others; that the evidence which would support the former might not support the latter. And he contended that it was a fallacy to assert that the issue of novelty lay on the plaintiff, who could never do more than make a *prima facie* case.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PABKE, B.—This was an application for better particulars of objections to a patent, under the 5 & 6 Will. 4, c. 83, s. 5; and the principal point discussed was, whether or no it was necessary, in an objection on the ground that the plaintiff was not the first inventor, or that the invention was not new, that the defendant should state who was the first inventor, or when, and in what place, and under what circumstances, it was used before. This point is not new, for it has been already before this Court, and also before the Court of Common Pleas, in the case of *Bulnois v. Mackenzie* (c). In that case the Court of Common Pleas would not require those particulars to be given, and their example has been followed by this Court, in the case of *Heath v. Unwin* (d). In the subsequent case, however, of *Jones v. Berger*, the Court of Common Pleas deviated from their former decision in *Bulnois v. Mackenzie*, and compelled the defendant to give the name of the first inventor. On consideration of the matter, however, we think that we ought to abide by the cases of *Heath v. Unwin* and *Bulnois v. Mackenzie* and that no particulars of the circumstances under which this invention may have been previously used should be required

(a) *Webster*, P. C. 544.

(b) 10 B. & Cr. 22; 5 Man. & Ry. 66.

(c) 4 Bing. N. C. 127; 6 Dowl. 215; 5 Scott, 419.

(d) 10 M. & W. 684.

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from the defendant; and we are fortified in this view by the decision of the Court of Queen's Bench, in the case of *Regina v. Walton* (a), in which they adopted the same view. That was originally an application to the Master of the Rolls, which afterwards came before the Court of Queen's Bench, which we find, on inquiry, to have determined this point the same way. On the authorities, therefore, we are bound to say that no such particulars ought to be required as are here asked for; and the argument of Mr. *Henderson* is very strong to confirm the propriety of that course, namely, that to require the defendant to afford this information, would be throwing the burden of proof on the wrong party. This rule must, therefore, be discharged as to this part of it, and can only be made absolute so far as it requires the defendant to point out whether he means to object to the patent altogether, as being granted for what was in reality an old invention; and if he only proposes to object to part, then he must state what part. If he means to object to the entire patent, he may state that he objects to it generally as not new; if he means to object to a particular part, he must designate that part. Then with respect to another objection which has been made, relative to the part of the notice which reiterates the terms of the plea, that the patent was obtained by fraud, covin, and misrepresentation, we certainly think that the defendant ought to state in what that fraud consisted and what was the species of misrepresentation by which he means to allege that the patent was obtained from the Privy Council. This rule will, therefore, be made absolute, so far as it requires the defendant to furnish better particulars of the fraud, covin, and misrepresentation mentioned in the plea; and also so far as requiring the defendant to state either that he objects to the patent generally, as not being a new invention, or that he only objects to part of it on that account, in which case he must specify what part. In all other respects the rule must be discharged.

(a) Not yet reported.

ROLFE, B.—There is certainly something very strange in the wording of the 5th clause of the stat. 5 & 6 Will. 4, c. 83, for it only says that the defendant, on pleading to the action, must deliver to the plaintiff a notice of the objections on which he means to rely at the trial, and no objection shall be allowed to be made on behalf of the defendant at such trial, unless he proves the objections stated in such notice. According to this, if you prove the objections of which you have given notice, you might give evidence to prove fifty others, of which no notice had been given at all.

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Rule accordingly.

MALLAN and Another v. MAY.

June 5.

COVENANT.—The declaration stated, that, on &c., by certain articles of agreement then made and entered into by and between the plaintiffs of the one part, and the defendant of the other part, [profert], it was mutually agreed

Covenant.—By articles of agreement under seal, it was agreed that the defendant should become assistant to the

plaintiffs in their business of surgeon dentists for four years; that the plaintiffs should instruct him in the business of a surgeon dentist, and that after the expiration of the term, the defendant should not carry on that business in London or in any of the towns or places in England or Scotland where the plaintiffs might have been practising before the expiration of the said service. The declaration alleged as breaches; first, that after the term, the defendant carried on the said business in London; secondly, that the plaintiffs had, during the said term, carried on business in Great Russell Street, Bloomsbury; yet the defendant, after the term, carried on the said business in the same place. Plea to the first breach, that London was a large and populous district, containing 1,500,000 inhabitants, and that the stipulation in the agreement was an undue, unreasonable, and unlawful restriction of trade. Plea to the second breach, that, before the expiration of the service, the plaintiffs had practised in very many towns in England, and amongst others, London, Preston, Oswestry, &c., and that divers of the said towns were distant from each other 150 miles; wherefore the said stipulation was an unreasonable restriction of trade, and the said agreement, as to so much, was wholly void.

Held, that the first plea was bad, as the covenant not to practise in London was valid, the limit of London not being too large for the profession in question; and that the latter part of it was also bad, for attempting to put in issue matter of law, viz. the reasonableness of the restriction.

Semble, that in considering the question of restriction, the populousness of particular districts ought not to be taken into consideration.

Held, secondly, that the stipulation as to not practising in towns where the plaintiffs might have been practising during the service, was an unreasonable restriction, and therefore illegal and void: but that the stipulation as to not practising in London was not affected by the illegality of the other part.

Every restraint of trade which is larger than what is required for the necessary protection of the party with whom the contract is made, is unreasonable and void, as injurious to the interests of the public, on the ground of public policy.

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and declared by and between the said parties thereto, firstly, that the defendant should thenceforth be and become assistant to the plaintiffs in their business of surgeon dentists, for and during the term of four years, computed from the date of the said articles, if both the parties should so long live, provided the defendant should conduct himself properly and to the satisfaction of the plaintiffs in transacting the said business; secondly, that the defendant should and would, during the said term of four years, aid and assist in the said business in a proper manner, and to the best of his skill and ability; thirdly, that the plaintiffs should and would, during the said term, instruct the defendant in the said business of a surgeon dentist, to the best of their ability; and that they would, during the said term of four years, at their own expense, find and provide for the defendant good and sufficient meat, drink, and lodging; fourthly, that, after the expiration of the said term of four years, the defendant should not nor would either directly or indirectly, without the consent in writing of the plaintiffs, carry on, or be concerned as principal or assistant or agent, or in any other capacity, in the profession of a surgeon dentist or any branch thereof, *in London or any of the towns or places in England or Scotland, where the plaintiffs, or the defendant on their account, might have been practising* before the expiration of the said service, and should not in any manner at any time make any use whatever of the names of the plaintiffs, or either of them, on his cards, plates, or advertisements, or otherwise howsoever, having reference to or containing any statement of his former connexion with the plaintiffs, or otherwise howsoever; and for the due performance of the stipulations contained therein, in the said fourth article thereof, on the part of the defendant, he the defendant did thereby bind himself, his heirs, executors, and administrators, to the plaintiffs, their executors and administrators, in the sum of £500, to be paid to the plaintiffs, their executors and administrators, by the defendant, his executors or administra-

tors, on any breach or default in performance of the said stipulations, and the same to be recovered as and for liquidated or assessed damages; provided always, and it was expressly understood and agreed, that the defendant should not be liable for any breach of the said stipulation thereinbefore contained, for carrying on such business in any such places as aforesaid, not therein expressly named, before he should know that the place where he should be so doing business was prohibited by the said articles, or he should have received notice from the plaintiffs or one of them, that the same was a prohibited place: And the plaintiffs say, that the said period of four years elapsed before the commencement of this suit; and that the plaintiffs did, to wit, during the said term, carry on the said profession in London, and did, after the expiration of the said term, to wit, thence to the commencement of this suit, carry on the said profession; and the plaintiffs say, that the defendant did, in pursuance of the said articles, to wit, on the 25th day of December, 1835, become and be an assistant to the plaintiffs in their said business of surgeon dentists, and so continued, to wit, during the said term of four years; and the plaintiffs did, during the said term, instruct the defendant in the said business of a surgeon dentist, according to the said articles, and did, during the said term, perform the said articles in all things on the part of the plaintiffs to be performed; and the plaintiffs say, that at the expiration of the said term, and thence at all times to the commencement of this suit, London was, and the defendant had notice and knew that London was, a place wherein he was prohibited by the said articles from carrying on (unless with the consent in writing in the said articles mentioned) the business of a surgeon dentist, after the expiration of the said term; and although the plaintiffs did not at any time consent in writing to the carrying on by the defendant of the said business as hereinafter is mentioned; yet the defendant did, before the commencement of the suit, and after

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the expiration of the term, to wit, on &c., and thence continually until the commencement of the suit (without the consent in writing of the plaintiffs), carry on the profession of a surgeon dentist in London, to wit, as principal, contrary to the said articles.

Second breach.—And for a further breach of the said articles the plaintiffs say, that they did practise as and carry on the profession of surgeon dentists before the expiration of the said service, to wit, during the said term of four years, in a certain place in England, and in the county of Middlesex, called Great Russell Street, Bloomsbury; and the plaintiffs say that, after the expiration of the said service, to wit, thence to the commencement of this suit, the plaintiffs have practised and carried on as the said profession of surgeon dentists, and the said last-mentioned place was, during the carrying on by the defendant as hereinafter mentioned of the said profession, and the defendant, at all times during the said time of carrying on the same as hereinafter mentioned, well knew that the said place was, prohibited to him the defendant by the said articles, and a place wherein, according to the said articles, he was not, after the expiration of the said term of four years, to carry on the profession of a surgeon dentist without the consent in writing of the plaintiffs; and the plaintiffs say, that they did not at any time consent in writing to the carrying on by the defendant, as hereinafter mentioned, in the said place hereinafter mentioned, of the profession of a surgeon dentist: yet the defendant, not regarding the said articles, did, after the expiration of the said term of four years, to wit, on &c., and thence for a long time, to wit, continually until &c., carry on, to wit, as principal, the profession of a surgeon dentist, in the said street and place, to wit, Great Russell Street, Bloomsbury, in the county of Middlesex, contrary to the said articles.

There were also other breaches assigned, for making use of the plaintiffs' names in advertisements, and on the de-

fendant's doors, &c. To this declaration the defendant pleaded, seventhly, to the first breach, that London, in the said agreement and declaration mentioned, at the time of making the agreement, was and from thence hitherto hath been and still is a certain large and populous district and place, containing more than one million of inhabitants, to wit, one million and a half of inhabitants; and that the said fourth article and stipulation, in the said agreement mentioned and contained, touching the defendant carrying on or being concerned in the profession of a surgeon dentist, or any branch thereof, in London, was and is an undue, unreasonable, and unlawful restriction of trade, and by reason thereof the said agreement, as to so much thereof, was and is wholly void.—Verification.

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The eighth plea, which was to the first and second breaches, alleged that, after the making of the agreement, and before the expiration of the service of the defendant, to wit, on &c., and on divers other days and times, the plaintiffs by themselves, and by and through the defendant on their account, practised as such surgeon dentists as in the said agreement is mentioned, in and at divers and very many towns and places within England, to wit, among others, in and at London, Preston, in the county of Lancaster, Peterborough, in the county of Northampton, Oswestry, in the county of Salop [enumerating a great many towns], of which premises the defendant afterwards, and before the committing of the said alleged breaches, to wit, on &c., had notice; and the defendant further says, that divers of the said towns and places, at which the plaintiffs so practised as aforesaid before the expiration of the said service, are and were distant from each other many miles, and exceeding 100 miles, that is to say, 150 miles; and that the plaintiffs, at the time of making the said agreement, intended to practise as aforesaid at divers towns and places within England, so distant from each other as aforesaid,

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that is to say, more than 100 miles distant from each other; wherefore the defendant says, that the said fourth article and stipulation in the said agreement contained, touching the defendant's carrying on or being concerned in the profession of a surgeon dentist, or any branch thereof, in any of the towns or places in England or Scotland, where the plaintiffs, or the defendant on their account, might have been practising before the expiration of the said service, was and is an unreasonable restriction of trade, and the said agreement, as to so much thereof, was and is wholly void and of none effect.

Special demurrer to the seventh plea, assigning for causes, that the said plea is improperly confined to the first breach of the declaration; whereas, if the said plea be valid, it is an answer to the whole action and to every breach in the declaration assigned, and ought to have been pleaded to the whole declaration, and not to a part thereof only: for that the said plea states no facts or circumstances from which the Court can infer, or it can be seen, that the said fourth article and stipulation was an undue, unreasonable, or unlawful restriction of trade, or from which it can be inferred or seen that the said agreement, or any part thereof, was or is void: that the said plea states only matter of evidence and matter of law, namely, that London was and is a place containing more than one million of inhabitants, and that the said article was and is an undue, unreasonable, and unlawful restriction of trade; whereas the said plea should have shewn that the said place was or is too large or populous for the plaintiffs to have carried on, throughout the same, their said profession; or should have shewn that the carrying on of their profession by the plaintiffs would not, and did not, suffice for the wants of the inhabitants of the said place; or should have stated and shewn other facts, from which it might have appeared, that the said article and stipulation was void for the reason supposed, or some other reason to be alleged: and for that

the said plea is so framed as to endeavour to submit to a jury questions of law, and so that the plaintiffs cannot safely take issue thereon.

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Special demurrer also to the eighth plea, assigning for causes, that it contains no answer to the breaches to which it is pleaded, or either of them, or any part thereof; that the said plea, if an answer to any part of the declaration, is an answer to the whole thereof, and ought to have been so applied and pleaded: that the said plea does not state any fact or facts from which it can be seen or inferred, that the said agreement, or any part thereof, was or is void; but merely states certain matters of evidence, namely, that the plaintiffs practised and intended to practise at certain towns, some of which were distant from each other more than 100 miles, of which the defendant had notice before committing the said breaches; and then proceeds to state certain matters of law, namely, that the fourth article and stipulation was an unreasonable restriction of trade, and that the said agreement, as to part thereof, was void; whereas the defendant should have stated and shewn facts from which it might have been inferred and seen by the Court, whether the said article and stipulation was in such restriction of trade, and whether the said agreement was, for the cause alleged by the defendant, or any other cause, void: that the said eighth plea does not shew that the towns and places at which the plaintiffs practised, as in the said plea alleged, were so distant as that the plaintiffs could not, during the time in question, have properly or sufficiently practised throughout the same, and so as to meet and suffice the wants of the respective inhabitants thereof: that the said plea is uncertain, in not stating or shewing which in particular of the towns and places in the plea mentioned or referred to are distant from each other more than 100 miles, or how many miles: for that the said plea does not state or shew that it was part of the said agreement that the plaintiffs should practise in the said places, or any other places distant from

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each other, but only that the plaintiffs practised at such places, and did, at the time of making the said agreement, intend so to practise: that the said plea is so framed as to endeavour to submit to a jury questions of law, and so that the plaintiffs cannot safely take issue thereon, or reply thereto: and for that the same amounts to, and is no more than, an informal demurrer.

Joinder in demurrer.

Whateley argued in support of the demurrer in Easter Term [May 1].—The eighth plea, which is pleaded to both the breaches, is clearly bad. The general rule is, that all restraints of trade, if nothing more appear, are bad. That is laid down in the leading case of *Mitchell v. Reynolds* (a), where all the cases are thoroughly weighed and considered, and which was confirmed by the case of *The Master &c. of Gunmakers v. Fell* (b). But to that general rule there are some exceptions; as first, if the restraint be only partial in respect to the time or place, and there be good consideration given to the person restrained, a contract or agreement upon such consideration, so restraining a particular person, may be good and valid in law. That was so held in the very case of *Mitchell v. Reynolds*. Now here it cannot be denied that the restraint is partial, nor that the consideration is sufficient. It is said, however, that it is unreasonable; but it is not so. In *Davis v. Mason* (c), where a bond was given by a surgeon's assistant, that he would not practise on his own account for ten years, within fourteen miles of where the surgeon lived, it was held to be valid. Lord *Kenyon*, C. J., there says, "It was objected that the limits within which the defendant engaged not to practise are unreasonable, but I do not see that they are necessarily unreasonable, nor do I know how

(a) 1 P. Wms. 181.

(b) Willcs, 388.

(c) 5 T. R. 118.

to draw the line. Neither are the public likely to be injured by an agreement of this kind, since every other person is at liberty to practise as a surgeon in this town." And in *Bunn v. Guy* (a), where a contract was entered into by an attorney to relinquish his business for a valuable consideration, and not to practise in London or 150 miles from it, it was held to be good. So a bond by an apothecary not to set up in business within twenty miles; *Hayward v. Young* (b). But an agreement that the defendant, a dentist, would abstain from practising over a district 200 miles in diameter, was held to be unreasonable and void: *Horner v. Graves* (c). That case partly turned upon the adequacy of the consideration; and since the cases of *Hitchcock v. Coker* (d) and *Archer v. Marsh* (e) must so far be considered to be overruled. But with respect to what is reasonable, *Tindal*, C. J., there lays down the rule thus: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a *fair protection* to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. No certain precise boundary can be laid down, within which the restraint would be reasonable, and beyond which excessive." In the present case, the protection given to the plaintiffs is by no means unfair or unreasonable. And after noticing *Davis v. Mason*, his Lordship adds, "Unless the case was such that the restraint was plainly and obviously unnecessary, the Court would not feel itself justified in interfering." Now this is not a greater restraint than is necessary for the protection of the plaintiffs, as the facts alleged in the plea shew. It is to prevent the defendant from availing himself of the knowledge he has acquired in the plaintiffs' service, to

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(a) 4 East, 190.

& P. 796.

(b) 2 Chit. Rep. 407.

(e) 6 Ad. & Ell. 964; 2 Nev.

(c) 7 Bing. 743; 5 Mo. & P. 738.

& P. 562.

(d) 6 Ad. & Ell. 440; 1 Nev.

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interfere with the plaintiffs' customers, and to practise in his name in those places where the defendant has notice that the plaintiffs carry on their business; and it appears that he has had such notice of their having practised in the places enumerated. These limits are very insignificant, compared with the kingdom at large, and are nothing like so extensive as those in *Horner v. Graves*. In *Hitchcock v. Coker (a)*, the ground upon which a restraint may be unreasonable is thus stated by the Court: "Where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made *can possibly require*, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." Now, that cannot be applied to the present case, for here it was clearly necessary for the plaintiffs' protection. In *Ward v. Byrne (b)*, the agreement was held void because it was unlimited in point of space. In *Proctor v. Sargent (c)*, the agreement was held valid, being limited both in time and space, and not appearing to be an unreasonable restraint of trade.

The seventh plea is also bad.—It calls upon the Court to say that the fourth article of the agreement is void, and that it is an undue restriction of trade, because London contains a million and a half of inhabitants; but that is not a sufficient reason for restraining the defendant from carrying on the same trade there. The quantity of the population is not a test of the reasonableness of the restraint; and there is no averment that London is too large or too populous for the plaintiffs to have carried on their business throughout the whole of it, or that their carrying it on did not suffice for the wants of the inhabitants. Besides, as the reasonableness of the restraint is a question for the Court, and

(a) 6 Ad. & Ell. 438; 1 Nev. & P. 796.

(c) 2 Man. & Gr. 20; 2 Scott, N. R. 289.

(b) 5 M. & W. 548.

not for the jury, the plea is bad, as leaving a matter of law to be decided by the jury. On such a plea the plaintiffs could not safely take issue.

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Martin, contra.—This agreement, being in unreasonable restraint of trade, is bad. There is no dispute as to the law, but the difficulty consists in applying it to the present case. It has been admitted that all restraints of trade are *prima facie* bad, and it is therefore the duty of the plaintiffs to shew that the restraint here insisted upon is valid. The fourth clause prohibits the defendant from practising in London, or any of the towns or places in England or Scotland, where the plaintiffs might have been practising before the expiration of the service. Now, that is clearly bad, since it may amount to an absolute prohibition to the defendant's carrying on business in this country; for it is at the option of the plaintiffs to go to every place or town of consideration, for a day, and so it would become a general restriction; and if it be, then it is clearly bad, and the contract being entire, if it is bad in part, it is void altogether. *Shackell v. Rosier (a)*, *Waite v. Jones (b)*; Chitty on Contracts, 693, 694. Secondly, the pleas are not bad for alleging that the fourth article in the agreement was "an undue, unreasonable, and unlawful restriction of trade," thus leaving the matter for the consideration of the jury; for they, and not the Court, are to determine whether the restraint is an unreasonable one or not; and the plaintiff might well have taken issue upon it. In *Hitchcock v. Coker (c)*, Lord Abinger, C. B., appears to have thought that this was a question of fact for the jury. And the judgment of the Chief Justice in that case shews it to be so, as it is a question depending upon the facts and the nature of the trade. Again, in *Proctor*

(a) 2 Bing. N. C. 646; 3 Scott, Scott, 730.

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(c) 6 Ad. & Ell. 447.

(b) 1 Bing. N. C. 656, 662; 1

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v. Sargent, Maule, J., says (a), "Is there any case, except *Horner v. Graves*, in which the Court have decided this question solely upon the record?" There are a variety of considerations which could not be stated with particularity in a plea, that enter into and are involved in the question whether it is a reasonable or an unreasonable restriction.

Whateley, in reply.—It is said that this agreement is unlawful, as being in restraint of trade, and that if bad in part, it is bad for the whole. But *Wood v. Benson* (b) shews that the covenant is divisible, and that an agreement may be void as to one part, and not as to the other. So, in the notes to *Butler v. Wigge* (c), it is said, "Where the condition of a bond is entire, and the whole be against law, it is void; but where the condition consists of several different parts, and some of them are lawful, and the others not, it is good for so much as is lawful, and void for the rest." Secondly, the reasonableness of the restraint is a question of law for the consideration of the Court, and not one of fact for the jury to decide upon.—He cited *Viner's Abr.*, "Journeys Accounts" (A.), p. 558.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—The demurrer to the seventh plea, which is pleaded to the first breach, raises two questions:—

First, whether the latter part of the plea be good, which avers the fourth article and stipulation in the agreement to be an undue, unreasonable, and unlawful restriction of trade; and if not, whether the residue of the plea is an answer to the first breach, or whether the covenant, of which it is a breach, is void in law.

The rule, as laid down by Lord *Macclesfield* and Lord

(a) 2 Man. & Gr. 24.

(b) 2 Cr. & J. 94; 2 Tyrw. 93.

(c) 1 Saund. 66 a.

Chief Justice *Willes* (a), is, that total restraints of trade, which the law so much favours, are absolutely bad, and that all restraints, though only partial, if nothing more appear, are presumed to be bad; but if the circumstances are set forth, that presumption may be excluded, and the Court are to judge of those circumstances, and determine whether the contract be valid or not. *Mitchell v. Reynolds* (b). "Contracts in restraint of trade are, in themselves, if nothing shews them to be reasonable, bad in the eye of the law." Per *Tindal*, C. J., in *Horner v. Graves* (c).

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Therefore, if there be simply a stipulation, though in an instrument under seal, that a trade or profession shall not be carried on in a particular place, without any recital in the deed, and without any averments shewing circumstances which rendered such a contract reasonable, the instrument is void. Such are the cases cited in *Prugnell v. Close* (d), and the case of *The Ten Tailors of Exeter v. Clarke* (e), and *Claygall v. Bachelor* (f); Year Book, 2 Hen. 5, fo. 5.

But if there are circumstances recited in the instrument, (or probably if they appear by averment), it is for the Court to determine whether the contract be a fair and reasonable one or not; and the test appears to be, whether it be prejudicial or not to the public interest, for it is on grounds of public policy alone that these contracts are supported or avoided. Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice pro tanto of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported; such is the

(a) *Willes*, 388, *Master &c. of Gunmakers v. Fell*.

(b) 1 P. Wms. 196.

(c) 7 Bing. 744.

(d) *Aleyn*, 67.

(e) 2 Show. 350.

(f) *Owen*, 143.

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case of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. It is in effect the sale of a goodwill, and offers an encouragement to trade, by allowing a party to dispose of all the fruits of his industry. *Prugnell v. Close* (a), *Broad v. Joliffe* (b), *Jelliot v. Broad* (c). And such is the class of cases of much more frequent occurrence, and to which this present case belongs, of a tradesman, manufacturer, or professional man, taking a servant or clerk into his service, with a contract that he will not carry on the same trade or profession within certain limits. *Chesterman v. Nainby* (d). In such a case the public derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business.

It is justly observed by Lord *Wynford*, in giving the judgment of the Court in *Homer v. Ashford* (e), that "it may often happen that individual interest and general convenience render engagements not to carry on trade, or act in a profession, in a particular place, proper; that engagements of this sort between masters and servants are not injurious restraints of trade, but securities necessary for those who are engaged in it; and that the effect of such contracts is to encourage rather than cramp the employment of capital in trade, and the promotion of industry."

In the present case, the statements in the deed declared upon show that the defendant was to be instructed in a business requiring skill and intelligence, and upon the principles above laid down, the contract not to exercise the

(a) *Alleyn*, 67.

(b) *Cro. Jac.* 596.

(c) *Noy*, 98.

(d) 2 *Lord Raym.* 1456; 2 *Str.* 739.

(e) 3 *Bing.* 326.

same business, within certain reasonable limits, was not invalid. *Exch. of Pleas*, 1843.

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The question then comes to this, whether the limits assigned by this covenant are unreasonable. It may be safely laid down, in the language of Chief Justice *Tindal*, in *Horner v. Graves* (a), that "whatever restraint is larger than the necessary protection of the party with whom the contract is made, is unreasonable and void, as being injurious to the interests of the public, on the ground of public policy."

Applying this rule, and referring to the analogous authorities, it appears to us that, for such a profession as that of a dentist, the limit of London is not too large. In *Davis v. Mason* (b), Thetford and ten miles round, in *Hayward v. Young* (c), twenty miles round a place, was held a reasonable limit in the case of a surgeon; in that of an attorney, London, and 150 miles round, in *Bunn v. Guy* (d); and in *Proctor v. Sargent* (e), five miles from Northampton Square, in the county of Middlesex, was held reasonable in the case of a milkman. And it makes no difference in our opinion, that it appears on the face of this record that London contains a million of inhabitants. We doubt, indeed, whether the comparative populousness of particular districts ought to enter into consideration at all; if it did, it would be difficult to exclude others, such as the number of men of the same profession, the habits of the people in that neighbourhood, and other matters of a fluctuating and uncertain character, which would produce great difficulty and embarrassment in determining such a question. We conceive that it would be better to lay down such a limit as, under any circumstances, would be sufficient protection to the interest of the contracting party, and if the limit stipulated for does not exceed that, to pronounce the contract to be valid.

(a) 7 Bing. 743.

(b) 5 T. R. 118.

(c) 2 Chitty, 407.

(d) 4 East, 190.

(e) 2 Man. & Gr. 20; 2 Scott, N. R., 289.

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We are of opinion, therefore, that the covenant, the breach of which is that first assigned, is valid.

We need hardly add, that the latter part of the seventh plea, which is pleaded to that breach, is bad, for the cause assigned for special demurrer. It attempts to leave matter of law, viz. the reasonableness or unreasonableness of the contract, to the jury. This is clearly a question of law, and was decided as such in *Davis v. Mason* (a), *Horner v. Graves* (b), *Proctor v. Sargent* (c), and *Chesman v. Nainby* (d). The plaintiff, therefore, is entitled to our judgment on the first breach.

The question raised by the demurrer to the last plea renders it necessary to consider, whether the covenant on which the second breach is assigned is good in law, upon the principle before laid down.

That covenant is, "that the defendant should not, without the plaintiffs' consent, carry on the profession of a surgeon-dentist, &c., in London, or any of the towns or places in England or Scotland, where the plaintiffs, or the defendant on their account, *might have* been practising before the expiration of the said service." According to the terms of this covenant, the defendant is prohibited from carrying on his business, not merely at such place or places as the plaintiffs might be practising in at the time of the expiration of the service, but at any place where they might have been practising before, though for ever so short a time. This covenant goes much beyond what the protection of any interests of the plaintiffs could reasonably require, and it puts into their hands the power of preventing the defendant from practising anywhere. We are therefore of opinion, that it is an unreasonable restriction, and that the defendant is entitled to our judgment on the de-

(a) 5 T. R. 118.

(b) 7 Bing. 735.

(c) 7 M. & G. 25.

(d) 2 Stra. 739; 2 Ld. Raym.
1456.

murrer to the second breach, for the insufficiency of the declaration in that respect.

It was contended, that, if the covenant was illegal and void as to this part, it was so altogether. But we think that the stipulation as to not practising in London is valid, and is not affected by the illegality of the other part. That point was decided in *Chesman v. Nainby*, above cited.

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Judgment accordingly.

HEATH v. NESBITT.

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A RULE had been obtained, calling on the plaintiff to shew cause why two orders of *Gurney, B.*, one for the defendant's arrest under 1 & 2 Vict. c. 110, s. 3, and the other refusing his discharge under s. 6, should not be rescinded, and the defendant be discharged out of custody. It appeared that the rule had been obtained upon fresh affidavits, and that those used before the learned Judge in support of the application at Chambers were not brought before the Court.

Although on an application to rescind a Judge's order made under 1 & 2 Vict. c. 110, for the arrest of a defendant, or for refusing to discharge him out of custody, either party, on cause being shewn, may produce additional affidavits; yet those used before the Judge at chambers ought to be brought before the Court.

W. H. Watson, on shewing cause, took a preliminary objection, that, as this application was in the nature of an appeal from the decision of the Judge, the affidavits used before him ought to be brought before the Court, to enable the Court to see whether or no the learned Judge had properly exercised his discretion in making the orders.

PER CURIAM (a).—Although additional affidavits may be used on an application of this kind, as we lately de-

(a) Lord Abinger, C. B., Parke, B., Gurney, B., and Rolfe, B.

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cided (a), still we ought to have before us those upon which the learned Judge refused to discharge the defendant; for, unless we are acquainted with the facts before him, it is impossible for us to determine whether he has exercised his discretion properly or not. We think the rule should be enlarged, in order that the party should have the opportunity of drawing up the rule on reading the original affidavits.

Watson then waived the objection, and shewed cause upon the merits, and the rule was ultimately

Discharged.

(a) *Gibbons v. Spalding*, ante, p. 174.

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The ATTORNEY-GENERAL v. ROGERS.

The Court has authority to, and will, grant a new trial in a penal action, though the verdict be for the defendant, where they are satisfied that the verdict is in contravention of law, whether the error has arisen from the misdirection of the Judge, or from a misapprehension of the law by the jury, or from a desire on their part to take the exposition of the law into their own hands.

THIS was an information filed against the defendant, a tobacconist, for penalties for mixing saccharine matter with tobacco in the course of manufacture, and for having in his possession saccharine matter for the purpose of using it in the manufacture of tobacco, contrary to the provisions of the 5 & 6 Vict. c. 93.

At the trial before Lord *Abinger*, C. B., at the Middlesex Sittings after last Hilary term, it appeared that the saccharine matter had been applied in the manufacture of tobacco before the 10th of August, when the new act came into operation, but the process of manufacture was not complete until after; and the jury found a verdict for the defendant, contrary to the direction of the learned Judge.

The *Attorney-General*, in Easter Term last, obtained a rule, calling upon the defendant to shew cause why that verdict should not be set aside and a new trial granted, on

the ground that the verdict was contrary to law, and to the direction of the Lord Chief Baron.

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Erle and *Thomas* now shewed cause.—The general principle laid down in *Brook v. Middleton* (a) is, that the Court will not grant a new trial in a penal action, where the verdict has passed for the defendant, on the ground of its being against the evidence. The case of *Gregory v. Tuffs* (b), where it was held that the Court would grant a new trial where the jury found a verdict through a misapprehension of the law, will perhaps be relied upon. But it is submitted, that where the trial has been properly conducted, and a proper direction given to the jury, the Court will not grant a new trial in a penal action, if the verdict be found for the defendant. There is no case in which the Courts have granted a new trial in such an action, unless there has been a misdirection, or the jury have misconducted themselves. The Courts have refused a new trial in such cases, by analogy between a penal action and a trial for a criminal offence, in which a party is not allowed to be put twice in jeopardy. In *Mattison v. Allanson* (c), which was an action upon the statutes against horse-racing to recover a penalty, the jury having found a verdict for the defendant, contrary to plain evidence, “the Court denied a new trial, there being no proof of any misbehaviour in the defendant, or tampering with the jury.” It is added, “And this was within the reason of cases in the Exchequer, where verdicts for defendants are never set aside for penalties in the case of duties.” In *Wilson v. Rastall* (d), Lord *Kenyon*, C. J., says, “Where, indeed, the jury have formed an opinion upon the whole case, no new trial in a penal action has been granted, though the jury has drawn a wrong conclu-

(a) 10 East, 268.

(b) 1 C., M. & R. 310.

(c) 2 Stra. 1238. See also *Smith*

v. *Freeman*, 1 Ld. Raym. 62; *Rex*

v. —, 2 Keble, 226.

(d) 4 T. R. 758.

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sion." And in *Calcraft v. Gibbs* (a), which was an action of debt for penalties under the game laws, the same learned Judge says, "If this case had been properly left to the jury, and they had even drawn a wrong conclusion, we should not have been disposed to grant a new trial in such an action as the present." So, in *Ranston v. Elteridge* (b), the jury having found a verdict for the defendant contrary to the Judge's direction, and founded on a mistake, the Court refused a new trial, there having been no misconduct in the jury. And in *Rex v. Wandsworth* (c), where the defendant had been acquitted on an indictment for the non-repair of a road, the Court refused a new trial, although the verdict was contrary to the weight of evidence. In that case, Lord *Ellenborough*, C. J., says, "My objection to making this rule absolute is, that the Court will thereby be doing indirectly that which, if they did directly, would be contrary to the established practice of the Court, acted upon in a variety of cases; that is, they will in effect be granting a new trial in a criminal case where the defendant has been acquitted." So, in *Rex v. Sutton* (d), which was a similar case, a new trial was refused, though the judgment was suspended (as it was also in *Rex v. Wandsworth*), Lord *Denman*, C. J., saying, "We are not disposed to make the precedent of granting a new trial." [*Parke*, B.—I was one of the Judges of the Court of Queen's Bench when that case was decided; but there was there no misdirection in point of law, although the Judge had made a strong observation to the jury, which we thought ought not to have been made.]

[They then proceeded to argue that the summing up was founded on a misconstruction of the stat. 5 & 6 Vict. c. 93; but that part of the argument is omitted, as no judgment was given upon it.]

(a) 5 T. R. 20.

(b) 2 Chit, Rep. 273.

(c) 1 B. & Ald. 63.

(d) 5 B. & Ad. 52.

The *Attorney-General, Jervis, and J. Wilde*, in support of the rule.—*Gregory v. Tuffs* (a), which was a decision pronounced after a communication with all the Judges, is expressly in point. That was an action on the 25 Geo. 2, c. 36, for keeping an unlicensed room for music and dancing. A verdict having been found for the defendant, a new trial was moved for, on the ground that the verdict was contrary to the direction of the Judge in point of law, and against the law. Lord *Lyndhurst*, C. B., said, "It is not usual, where a verdict has been found for a defendant in a penal action, to grant a new trial on account of the verdict being against the evidence; but whenever there has been a misdirection in point of law by the Judge who presided, it is a matter of course that a new trial should be granted, because the jury have been misled by the Judge in point of law. If, however, the jury are misled in point of law by any other means, there seems to be no reason why their mistake in point of law should not be rectified. In the present case, we are satisfied that the jury have acted on a misapprehension of the law." And after alluding to the evidence, and to what took place at the trial, he concludes as follows:—"We have conferred with the other Judges upon the subject, and they agree with us, that, under such circumstances, there ought to be a new trial." Now here it is not contended, that if the jury had been misled by the Judge in point of law, the Court ought not to grant a new trial; and there is no distinction between such a case and one where the jury have mis-applied the law as it bore upon the facts.

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LORD ABINGER, C. B.—With respect to the authority of the Court to grant a new trial in this case, or in any other of a similar nature, my opinion is, that, whenever the Court are satisfied that the verdict of the jury is in contravention

(a) 1 C., M. & R. 310.

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of the law, whether the error has arisen from the misdirection of the judge, or from a misapprehension of the law by the jury, or from a desire on the part of the jury to take the exposition of the law into their own hands, it would be very mischievous to say that the Court has no power to grant a new trial, however fit they might think the case for the discretion of a jury. If the objection of the defendant's counsel is to prevail, there would be no use in having established rules of law, because the jury might set them at defiance whenever they pleased, and probably they frequently would, were it once laid down that the Court could not question their verdict. The practice in criminal cases has been relied on, but that is a very different thing; there is this difference, that there the constitution has provided no means for granting a new trial or reversing the verdict, the constitution of the country having, in criminal cases, vested in juries full power to find as they think fit. So, in civil cases, where the question is a mixed question of law and fact, the administration of justice requires that the case should be submitted to the jury; and the Court will not, in these cases, grant a new trial merely because they think the jury may have been mistaken in the law. Where, however, the question turns on admitted facts, if we were to hold that we could not reverse a verdict found for a defendant, we should be placing the whole constitution of the law in the power of the jury. We think, therefore, that not only on authority but on principle, we have the power to award a new trial in actions of this nature, wherever the verdict for the defendant is contrary to law. Whether in this particular case the jury were wrong, is a matter deserving further consideration. Probably the Attorney-General may not be disposed to call on the Court to pronounce any judgment; and unless he does so, none will be given.

PARKE, B.—It will scarcely be worth while to ask us to

give our judgment on the other point, as, from the nature of the case, our opinion upon it can never be any authority on any general principle, whichever way it may be.

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ROLFE, B., concurred.

Judgment postponed accordingly.

FINDON v. PARKER, Bart.

June 10.

ASSUMPSIT for work and labour by the plaintiff as an attorney, and for money paid, and money found to be due on an account stated.

Assumpsit for work and labour as an attorney; to which the defendant pleaded a special plea, that the work was done in pursuance of an agreement, and under circumstances which amounted to maintenance. At the trial, it appeared that the lands in the parish of T. consisted of *old* and

The defendant pleaded, first, non assumpsit. Secondly, a special plea which stated in substance, that certain parties were occupiers of titheable land in the parish of Tredington, as tenants of the defendant and of Sir G. Phillips and others; that the principal, fellows, &c. of Jesus College, Oxford, had required the said occupiers to pay their tithes in kind; that the defendant, Sir G. Phillips, and the other proprietors claimed certain moduses; that it was officiously,

new inclosures, the former of which had always been exempted from payment of tithes in kind, there being paid instead a certain sum, varying in amount, for each of the several farms; whereas, for the *new* inclosures, tithes in kind were paid, or a composition in lieu of tithes entered into; that in 1832 the principal, &c., of Jesus College, the patrons of the living, and lessees of the tithes, having given notice to the tenants and proprietors of the old inclosures to set out their tithes in kind, a meeting of the proprietors in consequence took place, at which it was resolved "that the proprietors do resist the claim of the college, and support the present moduses; and that the expenses incurred in such proceedings shall be borne and paid by the proprietors, in proportion to the value of their estates; and that Messrs. F. (the plaintiff) & W. be requested to take such steps as may be considered necessary." This resolution was signed by the defendant and six other proprietors of land in the parish. At the time of entering into this agreement, it was uncertain whether the college would proceed by one or several bills in equity: but nine bills were subsequently filed, and seven issues were directed against the occupiers of the different farms:—*Held*, that this agreement was not illegal, and did not amount to maintenance, since the proprietors had reasonable ground to believe that they had a common interest in proving the lands to be ancient inclosures.

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unlawfully and unjustly agreed between the defendant, Sir G. Phillips, and the other proprietors, to resist the requisition of the college, and to support a defence to any suits, &c. instituted to support the claim of the college, and to bear and pay the costs of any such suits; that the college did institute certain suits; that the defendants resisted, and maintained, supported, &c. such defences and resistance; that a suit was instituted against the defendant; that the plaintiff was retained and employed in maintaining and upholding the said moduses, in pursuance of the said agreement: and that the work and labour &c. in the first count mentioned was performed by the plaintiff in furtherance of the said agreement; of all which said premises the plaintiff had notice.

Replication, that the work was done and the money paid on a good and lawful consideration, and that it was not officiously, unlawfully and unjustly agreed by and between the defendant and Sir G. Phillips, &c., to the effect in the said second plea mentioned, in manner and form &c.

At the trial before *Wightman, J.*, at the last Spring Assizes for the county of Worcester, it appeared that this was an action brought by the plaintiff, an attorney, for a share of the balance of his bill for defending certain tithe suits relating to lands in the parish of Tredington, of which the defendant and others were the proprietors. The lands in Tredington consisted of what were denominated the *Old* and the *New* inclosures, the former of which, from time of living testimony, had been exempted from the payment of tithes in kind, there being paid instead of them a certain sum varying in amount, for each of the several farms within the parish; whereas for the *New* inclosures tithes in kind were paid, or a composition entered into. In the year 1832, the principal, fellows, &c., of Jesus College, Oxford, being patrons of the living, and also lessees of the tithes,

gave notice to the tenants and proprietors of the *Old inclosures* to set out their tithes in kind. In consequence of this notice having been given; the proprietors of land in Tredington held a meeting together upon the subject of this claim by the college, and at that meeting it was resolved "that the proprietors do resist the claim of the college, and support the present moduses, and that the expenses incurred in such proceedings shall be borne and paid by the proprietors, in proportion to the value of their estates, and that Messrs. Findon and Wood be requested to take such steps as may be considered necessary." This resolution was signed by the defendant and six other landowners in the parish of Tredington. At the time of making this agreement, it was uncertain whether the college would proceed by one or several bills in equity. Nine bills, however, were subsequently filed, and seven issues were directed by the Lord Chief Baron to be tried against the occupiers of the different farms. These issues were set down for trial at Worcester Assizes, and the first of the issues was accordingly tried, but during the time that the jury were deliberating upon the first issue, and the second was in the course of trial, it was agreed by the counsel on both sides that the result of all the issues should depend upon the verdict in the first. The jury, however, being unable to agree, were discharged without returning any verdict. The plaintiff afterwards brought the present action for the balance due to him on his bill of costs. It was objected at the trial, that the agreement was illegal, as amounting to maintenance on the part of the different parties signing it. The learned Judge, however, was of opinion that it was not illegal; that the landowners had a common interest in resisting the claim to tithes, on the ground that the old inclosed lands had never paid tithes before; and he accordingly directed the jury to find for the plaintiff, reserving leave to the defendant to move to enter a non-

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suit or a verdict for him. A rule having been obtained accordingly,

Talfourd, Serjt., *Whitehurst*, and *Butt*, now shewed cause.—The question in this case is, whether the conduct of the defendant in attending the meeting and entering into this agreement to resist the claim of the College, amounted in law to maintenance; and it is submitted that it did not. To make this a defence, it must be specially pleaded, *Potts v. Sparrow* (a); therefore the question does not arise on non assumpsit, and the legality of the agreement stated in the plea is alone in question. The law of maintenance is thus defined by Hawkins, in his Pleas of the Crown, (B. 1, c. 83, s. 1): “Maintenance is commonly taken in an ill sense, and in general seemeth to signify an unlawful taking in hand or upholding of quarrels, or sides, to the disturbance or hindrance of common right.” The doctrine of maintenance, as laid down in the ancient law, has been since much narrowed. It is so stated by *Buller*, J., in *Master v. Miller* (b). “It is curious, and not altogether useless, to see how the doctrine of maintenance has from time to time been received in Westminster Hall. At one time, not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense which he would otherwise be put to, was held guilty of maintenance. Bro. Abr., tit. Maintenance, 7, 14, 17, &c. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a subpœna, or suppress the truth. That such a doctrine, repugnant to every honest feeling of the human heart, should be soon laid aside, must be expected. Accordingly, a variety of exceptions were soon made; and, amongst others, it was held, that if a person has any interest in the thing in dispute, though on a contingency only, he may lawfully maintain an action on

(a) 1 Bing. N. C. 594; 1 Scott, 578.

(b) 4 T. R. 340.

it; 2 Roll's Abr. 115." And in Hawkins, B. 1, c. 83, s. 18, it is said, "Also it seemeth to be agreed, that wherever any persons claim a common interest in the same thing, as in a way, churchyard, or common, by the same title, they may maintain one another in a suit relating to the same." Now here all these parties had an interest in the determination of these issues, and had a bonâ fide belief that the fate of one case would decide the fate of all. That cannot be maintenance, for that is an unlawful interfering in a cause in which a party has no interest whatever. This is not a case of statutable maintenance, but of maintenance at common law, which Lord Eldon, in *Waller v. The Duke of Portland* (a), says is not malum prohibitum, but malum in se. Therefore, it is an offence of the mind; and it is not committed by parties entering into an agreement to maintain and defend each other in a matter in which they believe their interest to be identical. If a party has the most remote interest, he may lawfully interfere.—They cited Bro. Abr., Chose in action, pl. 3; Vin. Abr., Maintenance, (P.) 3; *Flight v. Leman* (b), and *Pechell v. Watson* (c). [Lord Abinger, C. B.—Surely the old cases are now exploded. The sole question is, have the parties an interest, or do they believe they have an interest, in the action?].—They were then stopped by the Court.

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Kelly, R. V. Richards, and *W. J. Alexander*, contra.—It must be admitted that many of the older authorities cannot be upheld at the present day; but the law is correctly laid down in Co. Lit. 368. b.; and there it is said to be maintenance, "when one maintaineth the one side without having any part of the thing in the plea or suit." [*Rolfe*, B.—Surely, in a matter which is considered as criminal, that must mean, without having, or

(a) 3 Vez. 494.

353.

(b) Law J. Rep., Vol. 12, Q. B.,

(c) 8 M. & W. 691.

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believing himself to have, an interest.] Conceding that to be so, when the facts of this case are considered, it will be found that the defendant had not, and could not have supposed that he had, a common interest with the other six proprietors who were sued; for each alleged modus varied in amount from the others. [Lord Abinger, C. B.—Still the real point in dispute in all would be, whether they were ancient inclosures.] He cannot be considered as having a common interest with the other proprietors, merely because he is interested in common with them in establishing a particular fact. The case of *Oliver v. Bakewell* (a) is expressly in point. There it was held to be maintenance for parishioners to defend jointly a suit brought for tithes, and that the defendants might demur specially to a bill seeking a discovery of an agreement to that effect. This is an agreement between these parties, not to support one common interest, but to support each other, each of them setting up different defences. One defendant had no interest whatever in the land of the others. It is not one common defence, but the defences were separate and distinct from each other. [Lord Abinger, C. B.—This is an action to recover the balance due on a general bill of costs for all the suits, is it not? *Talfourd*, Serjt.—Yes.] Still the defence in each was separate and distinct.—They also cited *Bac. Abr., Maintenance*, (A).

Lord ABINGER, C. B.—I am of opinion that this rule ought to be discharged. I will put the case in the most naked form, for the purpose of applying what I have always considered as a maxim of law recognised and established. Suppose a man employs an attorney to defend an action in which he has no interest, and the attorney defends the action accordingly, does it lie in the mouth of the person

(a) 4 Gwillim on Tithes, 1381; 2 Eagle, 856. •

who employs him to say he was guilty of maintenance in employing him? Every man who has been in a Court of law has heard the maxim that a man cannot take advantage of his own wrong. In this case, however, I do not resort to that maxim, except to shew that the present is rather an unusual defence. This is said to be a case of maintenance at common law, where an action is brought against a man who admits himself to have been a party to the contract, but alleges that he has committed the crime of maintenance; and as that allegation is to the prejudice of another person, we ought to hold him to strict proof of the fact. The plea alleges the agreement to be corrupt and illegal; the replication denies that it was illegal or corrupt, in the manner and form alleged by the plea. Now I do not think that, in order to determine the question, we are bound to look at the ultimate results of the particular suits, but that we ought to see whether there was any ground on which the parties making this agreement might reasonably suppose that they had a common interest in resisting the claim of the college. That claim was a general claim of tithe in kind from all the defendants; the defences to which would depend upon the answers put in. Suppose the answer in each case claimed a distinct modus for the specific land occupied by each defendant, and claimed it in the exact terms of a modus—"from time whereof the memory of man runneth not to the contrary;" and suppose that all the parishioners making this agreement were satisfied that, as far as the parol evidence was concerned, and as far as human memory could go back, and ancient receipts could shew, they could prove the payment of the particular moduses on which they meant to rely, far beyond the time necessary in such cases. I put this case as being a stronger one than the present, because here the opinion really entertained by these parties was, that all the inclosures

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were of that antiquity as to shew that the moduses had been paid for enclosed lands. If the college could shew that these lands had once been common, and had been inclosed within the time of legal memory, they would give an answer to all the moduses: in that respect all the occupiers and proprietors had a common interest, to shew that these lands were ancient inclosures, or it might turn out that the college was able in some instances to prove that the lands were not ancient inclosures, and in others that the defendant succeeded in proving the lands to be ancient inclosures. It is a case of the same nature as if they had all claimed certain abbey lands, because then the question would be whether each could prove that his lands were of that description. In that case the issues would be found according to the various proofs in the cases; but still there would be a reason why they had one common interest in making a common defence. If any ground can be fairly suggested for making this contract legal, we ought to adopt it in favour of the party who makes the defence, in order to acquit him of the imputation that he casts upon himself. The contract does not necessarily imply any thing that the law calls maintenance. The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make. I do not like to give an opinion upon an abstract case, and therefore am not desirous to consider it; but if a man were to see a poor person in the street oppressed and abused, and without the means of obtaining redress, and furnished him with money or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation and strife, and to be guilty of the crime of

maintenance: I am not prepared to say, that, in modern times, Courts of justice ought to come to that conclusion. However, I give no opinion upon that point. In this case I proceed upon the ground, that there was reasonable evidence of a common link of interest uniting the proprietors of the lands in question, at the time they made the agreement.

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GURNEY, B.—When the parties entered into this agreement, they seem to have had reasonable ground of belief that they had all one common interest in proving the lands for which the moduses were claimed to be ancient inclosures; and, being of that opinion, I think it follows that there is nothing illegal in the agreement, and, therefore, that this rule must be discharged.

ROLFE, B.—I am of the same opinion. The only hesitation I have had in the case has arisen from the fear, that the indignation one feels against so unrighteous a defence as the present might lead me into bending the law more than ought to be done. But I think the law here appears to concur with the honesty of the case. It seems that, Jesus College being the lessees of these tithes, and having set up a demand for payment of them in kind, the landowners, not having been accustomed to pay them, met to consider what was to be done. It appears it was stated at the meeting, that if one modus failed the whole must fail. That, perhaps, was wrong; but if it was the bonâ fide opinion of the proprietors, and they thought it was something in the nature of a farm modus, and that it was apportioned in different shares among the different landowners of the district, and that they had a common interest in it, and, having formed that opinion, they entered into this agreement, the only question on these pleadings is, was that or was it not a legal agreement? What is the

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agreement? It is an agreement by the proprietors of the land to resist the claim of the college to the payment of tithes in kind, and to support the present moduses. I may observe that these parties were not, in truth, the occupiers—not the parties who really were to pay the tithes, but the landlords. But whatever may be the law of maintenance in modern days, and however it is to be restricted, I do not believe that, in the most stringent times, the act of a landlord in protecting his interest in lands in the occupation of his tenants would be called maintenance, because it is, in truth, protecting his own actual reversionary interest. Any lawful construction must be placed upon this agreement, rather than one that renders it criminal; and the natural construction is, that the proprietors supposed that all the tenants would be included in the proceeding; then, so far from their conduct being illegal, it is merely an arrangement, that, as there is one proceeding against all, they will pay in proportion to their interests. That being the agreement entered into, and the traverse being whether in truth that agreement was or was not illegal, it seems to me to be clear that it was not illegal, and consequently that this rule ought to be discharged.

Rule discharged.

1843.

JACOBS v. LAYBORN.

June 10.

THIS was an action for goods sold and delivered, tried before *Cresswell*, J., at the last Assizes for the county of Devon. The plaintiff having proved the delivery of the goods at the house where the defendant lived, who was a young lady residing with her father, and the question being to whom credit had been given, the father was called as a witness on the part of the defendant, to shew that the contract, if any, had been made with him, and not with his daughter. After several questions had been put to him, the plaintiff's counsel interposed, and asked him whether he was not responsible to the defendant's attorney for the costs; and, on his answering the question in the affirmative, objected to him as incompetent. The defendant's counsel contended, that the objection came too late, as the witness ought to have been examined on the *voir dire*. The learned Judge, being of that opinion, overruled the objection, and the evidence was accordingly received, and the defendant obtained a verdict.

Where a witness for the defendant, to whom several questions had been put in his examination in chief, stated, in answer to a question put to him by the plaintiff's counsel, who had interposed, that he was answerable to the defendant's attorney for the costs, and was thereupon objected to as incompetent:—*Held*, that the objection did not come too late.

Crowder, in Easter Term, moved for a rule to shew cause why there should not be a new trial, on the ground that the evidence was improperly received; citing *Turner v. Pearte* (a) as an authority, that the strict rule which formerly existed on this subject had been relaxed. [*Parke*, B.—Where a witness's incompetency is discovered accidentally in the course of his examination, he may, I think, with propriety be objected to when the discovery is made; but where it is known to the opposing counsel from the commencement of his examination, I think he ought not to be allowed to lie by and take the chance of the evidence being in his favour, and when he finds it to be unfavourable to him, then to take the objection. In *Yardley v. Arnold* (b), where this point arose, I endeavoured to

(a) 1 T. R. 717.

(b) 10 M. & W. 141

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bring back the old practice; but I consulted the other Judges upon the subject, and they concurred with me in the opinion I have just expressed. In *Turner v. Pearte, Buller, J.*, says—“Anciently, no doubt, the rule was, that if there were any objection to the competency of the witness, he should be examined on the voir dire; and it was too late after he was sworn in chief. In later times, that rule has been a little relaxed; but the reason of doing so must be remembered. It is not that the rule is done away, or that it lets in objections which would otherwise have been shut out. It has been done principally for the convenience of the Court, and it is for the furtherance of justice. The examination of a witness, to discover whether he be interested or not, is frequently to the same effect as his examination in chief. So that it saves time, and is more convenient, to let him be sworn in chief in the first instance; and in case it should turn out that he is interested, it is then time enough to take the objection.” But these observations do not at all apply here; for *Buller, J.*, is evidently speaking of a case where the disqualifying circumstance is discovered on the examination in chief. In *Howell v. Lock (a)*, Lord *Ellenborough* said, that if at any time it appeared incidentally that the witness was interested, he would strike out his evidence; but that he could not, in cross-examination, allow the counsel the privilege of an examination on the voir dire. Lord *Abinger, C. B.*—The rule suggested by my Brother *Parke* may be quite right in itself; but I question the power of the Judges to make such a rule. I do not like to see rules of practice continually altered according to the discretion of the Judges. If the law or practice be wrong, it would be much better that it should be set right by the legislature.]—The rule having been granted,

Cockburn and Montague Smith now shewed cause.—The

(a) 2 Camp. 14.

objection to the competency of the witness ought to be taken on the voir dire, or at least, if allowed to be taken during the examination in chief, it should be as soon as his incompetency is discovered, which in this case must have been long before the objection was taken. The old rule was, that the objection must be taken on the voir dire. That rule has undoubtedly been relaxed in many instances, for the sake of convenience, where a witness has turned out to be incompetent from circumstances disclosed in his examination in chief. But it has never been held that a party, who knows from the outset that a witness is interested, may lie by and take the chance of the evidence being in his favour, and object to his competency when he finds it is against him. The decision in *Turner v. Pearle* (a) shews, that a party cannot object to the competency of a witness at any stage of his examination; and *Buller, J.*, there says, "It is not that the rule is done away, or that it lets in objections that would otherwise be shut out." And the Courts have of late shewn a disposition to return to the strictness of the old rule. In *Dewdney v. Palmer* (b), it was held that the proper time to object to the witness was on his being called on the voir dire, and that evidence could not afterwards be adduced to shew his incompetency. There the Court said, that the regular way, although in some instances it had been improperly departed from, was to make this objection on the voir dire, when other evidence might have been called, if necessary, to prove the competency, and then, if the incompetency were established, an opportunity would be afforded to the plaintiff of proving his case by other evidence. In *Yardley v. Arnold* (c), *Parke, B.*, says, "I cannot help wishing very much that it was established as the regular practice, that when once a witness is sworn, no questions should be put to him in order to raise objections to his competency; I think all such should

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(a) 1 T. R. 719.

(b) 4 M. & W. 664.

(c) 10 M. & W. 141.

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be put to him on the voir dire, and that when once sworn in chief, his competency should be taken for granted." In *Hartshorne v. Watson* (a), Tindal, C. J., says, "I think this man was not an interested witness; but if he were, the objection should have been taken on the voir dire." And in *Wollaston v. Hakewill* (b), the same learned Judge says, "In the present instance, where it is manifest from the evidence brought forward, that, if asked the question, the witness must have given such an answer as would have shewn her competency, we think we ought not to yield to the objection, when the opposing party has waived the proper time and manner allowed by law for raising it." Now here the question might have been asked in the first instance. It is, however, not necessary to go the length of saying that the objection should be taken on the voir dire; at all events it ought only to be open to a party, where facts are disclosed for the first time, which shew that the witness is interested; the party ought not to be allowed to lie by until he finds the evidence pinches, and then make his objection. [*Rolfe, B.*—If you once admit the principle that the objection may be taken at any other time than on the voir dire, I do not see how you can object to its being taken at any time.] In all the authorities, it is laid down that the law of the land is, that the objection should be taken on the voir dire, but that in practice it has been sometimes allowed afterwards, where it has subsequently turned out that the witness is interested, to meet the justice of the case. [*Rolfe, B.*—Does it necessarily follow that the examination on the voir dire is to precede the examination in chief? May it not be that, as soon as his interest is discovered, in order to determine whether he is competent or not, his examination in chief to the jury may be stopped, and a separate examination, under the name of voir dire, be instituted by the

(a) 5 Bing. N. C. 477; 7 Scott, 494.

(b) 3 Scott, N. R. 593; 3 Man. & G. 297.

Judge? It may be, that, whenever an examination is stopped by an objection of this nature, the Judge may have the witness sworn on the voir dire, to answer "all such questions as the Court shall demand of him," in order to examine him as to his competency. That would still be an examination on the voir dire, though subsequent to the commencement of the examination in chief.] There is no case which shews that that has ever been done. [Lord *Abinger*, C. B.—Nor is there any authority against its being done.] The recent cases have shewn, and the Courts have intimated, that the practice which for some time prevailed is not to be followed, but that the strict rule is rather to be adhered to.

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Crowder and Greenwood, in support of the rule.—The case of *Yardley v. Arnold* is in truth an authority against the defendant; for although *Parke*, B., expressed himself in favour of an adoption of the former strict rule, he admitted the practice to be otherwise, and rejected the witness on its turning out that she was interested, after she had been sworn in chief. In an old case, *Needham v. Smith* (a), which occurred in 1704, and which was an appeal from the Rolls, it was objected to the evidence of one Norris, a witness examined in the cause, and read at the hearing at the Rolls, that since that hearing, in answer to a bill exhibited against him, he had confessed, that on the day on which he was examined he took a bond of the plaintiff, that, if the plaintiff recovered the estate, he would convey part of it to him: and it was held by Lord Keeper *King*, assisted by *Holt*, C. J., and *Powell*, J., that the answer ought to be read: and the Lord Keeper there says,—“Though a witness is examined an hour together at law, if in any part of his evidence it appears that he was a party interested, the Court will direct the jury, that he is

(a) 2 Vernon, 463.

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no witness, nor any regard to be had to his evidence." And on the trial of Lord *Lovat* (a), where a witness who had been sworn in chief was objected to by the prisoner as incompetent, and had denied the fact on which his incompetency was supposed to rest, Lord *Hardwicke*, who acted as Lord High Steward, held that the prisoner might call witnesses to contradict him, saying, "It has been frequently done after a witness has been sworn in chief. At the trial, when a witness is tendered by the plaintiff to be sworn, the oath to give evidence in chief is administered to him, unless the defendant makes an objection to his competency, and then he may be examined touching that objection on a *voir dire*; but after the witness has been sworn in chief, if any objection is then made to him, he may be asked the same question by virtue of his oath in chief as he might have been asked upon a *voir dire*. I have known it done both ways." [They were then stopped by the Court.]

LORD ABINGER, C. B.—I am of opinion that this rule ought to be made absolute. The plaintiff's counsel have furnished us with a proof of the antiquity, at least, of the practice contended for by them. They have shewn that it has been recognised by the high authority of Lord *King*, assisted by those other learned Judges who sat with him on that occasion, and confirmed afterwards by the opinion of Lord *Hardwicke*, one of the greatest Judges who ever presided in this country, not only on the law, but on the reason of the law. To this I can add the testimony of my own experience, which has been of more than forty years, that, whenever a witness was discovered to be incompetent, the Judge always struck the evidence which he had given out of his notes. I have known both Lord *Ellenborough* and Mr. Baron *Bayley* erase whole pages in this way; and it was not the practice to swear the witness on

(a) 18 How. State Trials, 596.

the voir dire, unless specially required by the party against whom he appeared. It is a very singular thing, that I do not recollect a case ever occurring before Lord *Kenyon*, in whose time I was in the habit of constantly attending the Courts, in which a witness was sworn on the voir dire : and it very seldom happened in the time of Lord *Ellenborough*, although of late years the practice seems to have become more frequent. In Courts of equity, also, it is every day's practice to object to a witness as incompetent, whenever his incompetency appears ; there is no examination on the voir dire ; and it certainly may be said, that the danger spoken of by the defendant's counsel in this case, of a party withholding his objection till he sees a favourable opportunity for making it, cannot arise in those courts, as the evidence is kept secret, so that the party who would make the objection if he could might not know when to take it. Still the same inconvenience would exist more or less ; and it might well be said, that, if a party knew of any objection to the witness, he ought to state it at once. The reason of the practice rests on this ground,—the law will not allow a verdict to stand which has been obtained on the evidence of a person whom the rules of law have declared incompetent to give evidence. Historians and others may receive all kinds of evidence of facts, hearsay as well as any other ; but with juries it is otherwise, for the law (whether wisely or not it is unnecessary to discuss) excludes all testimony that it considers dangerous. Suppose, for instance, a verdict obtained on such illegal testimony were questioned by means of a bill of exceptions, would it not be set aside ? There is no statute which says that the incompetency of a witness must be determined by an examination on the voir dire ; when a man is examined on the voir dire, the examination is only to satisfy the conscience of the Judge, the jury having nothing to do with it. Now a witness may, on his examination on the voir dire, appear perfectly competent ; and the

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circumstance shewing him not to be so may appear afterwards. Suppose, for instance, a man examined on the voir dire were, in answer to questions put to him, to swear distinctly that he had never been convicted of felony or perjury, he is then *prima facie* competent, and is sworn in chief; but while his examination is being proceeded with, the attorney for the party against whom he appears goes away, and fetches the record of his conviction—is not the opposite counsel to be permitted to question him anew as to that conviction? So, in any other case, I do not see why counsel should be restrained from inquiring at any moment into the witness's competency; and, if they see that he is swearing falsely, excluding his testimony if they can. A counsel who knows of an objection to the competency of a witness may very fairly say, "I will lie by, and see whether he will speak the truth; if he does not, I will exclude his evidence." I see no hardship or injustice at all in that course. In short, there is ample authority to shew that the ancient, if not universal, practice has been to allow objections of this kind to be taken as was done in this case; and whatever new lights may be devised for the formation of new rules, we will for the present apply the old one, for this, among other reasons,—that, if a new rule be desirable, it ought not to have an *ex post facto* operation. Indeed, in the cases which have been cited as authorities for an alteration in this respect, the existing practice is expressly recognised and acted on, and those cases only amount to the dicta of certain Judges, that, in their opinion, it ought to be altered. I think, also, that there is much weight in the observation of my Brother *Rolfe*, that the question of competency is not for the jury; so that, in every case where any question is raised about it, there ought properly to be an inquiry made of the witness, who should be sworn "to make true answer to all such questions as the Court should demand of him;" in other words, that an examination on the voir dire may be instituted at any period of

the examination. For the sake of convenience, it is the usual practice to swear him, in the first instance, to give his evidence in the cause, and the peculiar form of the oath administered on the voir dire arises from the circumstance, that the points to which the witness is about to be examined are not evidence in the cause. It may be very proper to interpolate that oath at any period of the examination of the witness that justice may require, and this consideration will reconcile all the difficulties which have been raised.

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ROLFE, B.—I am of the same opinion. I think the term “examination on the voir dire” may, as I have already observed, mean a separate examination, in order to ascertain the competency of the witness; and the relaxation of the old rule may mean merely that the formal oath upon the voir dire has been dispensed with. As to a practice being ancient or modern, the phrase appears to be very ambiguous.

Rule absolute.

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The ATTORNEY-GENERAL v. TRUEMAN (a).

A writ of extent having issued against A., a maltster, for a debt due to the Crown from him for duties on malt, a cargo of malt was seized under it in the hands of the defendant. The defendant being allowed to plead to the extent, in order to state his interest in the goods, alleged by his plea that the malt in question, after being manufactured, had had the duty charged upon it, and that such duty was paid; that it was then deposited by A., the maker, with the defendant, upon a contract with him, that he was to accept certain bills of exchange drawn by A., and that

the malt was to be held by him as a pledge for the payment of them, and in case the bills were not paid, he was then to be at liberty to sell the malt; that the bills first accepted were renewed, but before the renewed bills became due the malt was seized:—*Held*, that the malt was seizable in the hands of the defendant, under 28 Geo. 3, c. 37, s. 21, as goods *in the custody or possession of a person in trust for the maker, chargeable with duties of excise in arrear and owing from such maker, such goods having been, whilst in the hands of A., liable not only for the specific duties chargeable upon them, (which had been paid), but for other duties for which A. was responsible at that time, and remaining so at the time of the seizure.*

Quere, whether goods chargeable with excise duties under 7 & 8 Geo. 4, c. 53, s. 28, deposited with a person as a pledge for acceptances given by him to the maker, before the passing of 4 & 5 Vict. c. 20, by which the section of the former act imposing the duties was repealed, and similar duties imposed, were liable, since the passing of that act, to be seized in the hands of the pledgee.

A WRIT of extent, tested the 15th of July, 1841, having issued against Samuel Harrison Armitage for a debt of 6992*l.* 16*s.* 5*d.*, for excise duty on malt by him made in Great Britain, and charged upon him between the 1st of January and the 21st of May, 1841, a commission issued, directed to the sheriff of Lancashire, to ascertain what goods, &c. he the said S. H. Armitage had in the said sheriff's bailiwick; and an inquisition was accordingly taken, and a return was made to it, which found amongst other things as follows:—That the said S. H. Armitage was, on the day of its suing the writ, possessed, as of his own proper goods and chattels, of divers, to wit, 1353 loads of malt, then in the custody of the Rochdale Canal Company, in their warehouses at Manchester; that the said last-mentioned goods were of the value of £2916; that, on the 29th of March last, the said S. H. Armitage did order the said Rochdale Canal Company to transfer, and the said Company in their books did transfer, certain part, to wit, 1254 of the said loads of malt, into the name of one Michael Trueman, a corn-factor at Manchester aforesaid, for the purpose of being sold by the said M. Trueman, for and on account of the said S. H. Armitage; and that the said S. H.

(a) This case was decided in last Hilary Term (Jan. 30), but was unavoidably postponed.

Armitage did, in the said month of March, draw, and the said M. Trueman did then accept, certain bills of exchange for the amount of £2380, for and on account of the said goods and chattels; and it was then agreed between the said M. Trueman and S. H. Armitage, that the said bills should be renewed from time to time until the said goods and chattels should be so sold as aforesaid, or that the said S. H. Armitage should provide funds for the due payment of the same bills, when the same became due: and the jurors aforesaid further find, that when the same bills became due, the same bills were taken up and paid by the said M. Trueman, and that the said S. H. Armitage did repay the said M. Trueman the amount of the said bills so paid as aforesaid, and did then, to wit, in the month of June, in the year 1841, draw, and the said M. Trueman did then accept, certain other bills of exchange to the said amount of £2380, and that the said bills of exchange are still unpaid, the same not being yet due and payable; and that the said Michael Trueman claims a lien upon the said goods and chattels, for the said sum of £2380, and for 98*l.* 5*s.* 5*d.* for his charges in that behalf expended in and upon the said goods and chattels.

To this return the defendant pleaded, that the said S. H. Armitage, long before the issuing of the said writ of extent, to wit, on the 1st March, 1840, and thence continually until the issuing of the said writ, to wit, at Wakefield, in the county of York, carried on business in partnership with one Matthew Dodgson, as sellers of malt; that the defendant was a corn-factor, and that before the issuing of the writ, to wit, on the 19th of March, 1841, the said Armitage & Dodgson, as such co-partners, were possessed of, amongst other quantities, the said 1254 loads of malt in the inquisition mentioned, and being so possessed, they, before the issuing of the writ, to wit, on the day and year last aforesaid, at &c., in the regular course of their trade as sellers of malt, consigned the same 1254 loads of malt to the said M. Trueman, as

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such factor, to be by him sold on their account, for commission and reward to him in that behalf, upon and subject to certain terms and instructions hereinafter in that behalf mentioned; that is to say, the said S. H. Armitage and M. Dodgson then and there delivered the said 1254 loads of malt to certain carriers, to wit, the said Rochdale Canal Company, in the said inquisition mentioned, to be carried and conveyed by the said Rochdale Canal Company from a certain place, to wit, from Wakefield aforesaid, to a certain other place, to wit, to Manchester aforesaid, and there, to wit, at Manchester aforesaid, to be by the said Canal Company held and received into store, to the order of the said M. Trueman, at a certain warehouse of the said Rochdale Canal Company; and the said Rochdale Canal Company, long before &c., to wit, on the said 19th March, 1841, accordingly, to wit, then, had and received the said 1254 loads of malt as aforesaid, and carried them as aforesaid, and, to wit, on the day and year last aforesaid, to wit, at Manchester aforesaid, placed them in store at the same warehouse, to the order of the said M. Trueman, and then and there gave notice thereof to the said M. Trueman, and then and there agreed with the said M. Trueman to hold the same for him; and the said Rochdale Canal Company did, from thenceforth until the time of the seizure of the said 1254 loads of malt, under the said writ of extent, as in the said inquisition mentioned, at the said warehouse, hold the same as the bailees and servants of the said M. Trueman, and for him, for reward to them in that behalf. And the said M. Trueman further says, that the said 1254 loads of malt were so consigned by the said Armitage & Dodgson to him as such factor, upon certain terms and with certain instructions; viz. that he the said M. Trueman should hold the same for two months from the date of the receipt of the same into store as aforesaid; that, on the expiration of that period, the said Armitage & Dodgson should either instruct him to sell

the same, or else give him notice that they would furnish him with cash to meet their drafts, being the bills of exchange in the inquisition mentioned, and which drafts were to be drawn on and accepted by him as such factor, on account of the said malt, so as to prevent him the said M. Trueman from being under cash advance on the same : to which said terms he the said M. Trueman agreed, and then and there accepted the said consignment, and the said 1254 loads of malt, on and subject to the said agreement. The plea then stated, that Armitage & Dodgson, in pursuance of the agreement, drew, and the defendant accepted, on account of the said 1254 loads of malt so consigned to him, and as an advance to Armitage & Dodgson by him the said M. Trueman, as such factor, thereupon made, divers, to wit, three, bills of exchange, (the dates and amounts of which were stated), and having accepted those bills, delivered them to Armitage & Dodgson. It then went on to state, that, when the bills became due, they were renewed from time to time ; and that neither of the last-mentioned three bills of exchange so accepted on renewal of the said first-mentioned bills became due or payable until after the teste or issuing of the said writ of extent, and that the said three last-mentioned bills, being negotiable, were, to wit, before and at the time of the issuing of the writ, and from thence until the payment thereof by Trueman as thereafter mentioned, outstanding in the hands of third parties, being holders for value, and that the said M. Trueman had since been obliged to pay, and had paid, the same to the holders thereof when they became due ; and that, at the time of the issuing of the extent, the said 1254 loads of malt so consigned as aforesaid remained in his hands and possession. It then alleged, that the said M. Trueman had never been reimbursed in respect of the payment of those bills by Armitage & Dodgson ; that the 1254 loads of malt so consigned as aforesaid, and so held by him into store, were the same 1254 loads in the inquisition

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mentioned; and that no duties whatever were due to the Crown in respect of this particular quantity of malt, but that the duties thereon had been duly and regularly paid: and then the plea concluded with the traverse, "without this that the said S. H. Armitage, in the said writ of extent named, was, on the day of the issuing the said writ of extent, possessed, as of his own proper goods and chattels, of the said 1254 loads of malt, parcel of the said 1353 loads of malt, then in the custody and care of the Rochdale Canal Company, or any part thereof, as in the said inquisition is supposed, and this the said M. Trueman is ready to verify."

To this the Crown, availing itself of its privilege, pleaded several replications, but the fourth only was material; which stated, that, before and at the times thereafter mentioned, and from thence until the issuing of the extent, the said 1254 loads of malt in the plea and inquisition mentioned were goods and commodities for and in respect of which a certain duty of excise was and is by law imposed, to wit, at &c.; and that the said S. H. Armitage, during all that time, was a person carrying on the said trade and business of a maltster and maker of malt, in respect of which said trade and business the said duty of excise was and is by law imposed as aforesaid, to wit, at &c.; and that the said 1254 loads of malt in the said plea mentioned, so being such goods and commodities, and the said S. H. Armitage so being then and there a person carrying on such trade and business, in respect of which the said duty of excise then and there was and is by law imposed as aforesaid, the said 1254 loads of malt in the said plea mentioned were, heretofore and long before the issuing of the said writ of extent, to wit, on the 1st of January, 1841, and from thence for a long time, to wit, until the 21st of May in the same year, in the custody and possession of him the said S. H. Armitage, to wit, at

&c., so carrying on such trade and business of a maltster : and the said Attorney-General, on behalf of her Majesty, further says, that, during the time of the said custody and possession of the said S. H. Armitage of the said 1254 loads of malt, certain duties of excise, amounting to a large sum of money, to wit, £6992, became then and there chargeable, and were then and there charged upon, and in arrear and owing from, the said S. H. Armitage, so carrying on the trade and business of a maltster and maker of malt, in respect of which the duty of excise is by law imposed, as and for the duties of excise on malt by him before that time made in Great Britain, in manner and form as in the said writ of extent alleged. It then stated, that the duty so charged upon and owing by Armitage remained unpaid, by reason whereof, and by force of the statute, the said 1254 loads of malt were, and still remained at the time of the issuing of the extent, subject and chargeable with the said sum of £6992, so due to her Majesty by the said S. H. Armitage as and for the said last-mentioned duties.

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General demurrer (a), and joinder in demurrer.

Kelly argued in support of the demurrer, (Jan. 26).—The question is, whether, under the 24th section of 4 & 5 Vict. c. 20, the Crown has a right to follow this malt into the hands of a factor, who has received it under such an agreement, and made advances upon it, and acquired authority to sell it for the purpose of reimbursing himself those advances. It is hoped that the Court will not affirm the right of the Crown to such an extent, as the consequence would be that the malt trade could no longer be carried on ; for it could not be carried on without such advances being made, and no factor will ever make advances, if he finds he has no security from the possession of the malt against any

(a) The Crown not being within the statutes as to special demurrers.

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But before that question arises, there is a point which may render the determination of it unnecessary. The stat. 4 & 5 Vict. c. 20, s. 24, under which this claim is made, provides that all goods and commodities, subject to duties of excise, and all materials, machinery, vessels, and implements used in the manufacture, shall be liable for all duties, arrears, and penalties incurred whilst in the possession of the trader, with a proviso, that where the duty has been paid, and where the goods have been sold and delivered in the fair and ordinary course of trade, that liability is to cease.

Now, by the 23rd section of that act, the former act, 7 & 8 Geo. 4, c. 53, under which the same claim might have been made under similar circumstances, was repealed; and at the time when this statute came into operation, viz. on the 18th of May, 1841, the goods in question were no longer in the possession of Armitage & Co., the maltsters, but had been consigned to the defendant Trueman in the month of March preceding, and the acceptances had been given under the agreement, and the lien had attached, and Armitage & Co. had only a contingent and reversionary interest in the goods. The question, therefore, will be, whether that act could have any retrospective operation; and a similar question will arise to that which occurred under the Bankrupt Act, (6 Geo. 4, c. 16), in the cases of *Maggs v. Hunt* (a) and *Surtees v. Ellison* (b), where it was held that, it being an established principle that when an act is repealed it must be considered (except as to past transactions) as if it had never existed, the Court must look at the statute as if it were the first act that had ever been passed on the

(a) 4 Bing. 212; 12 Moore, 357. (b) 9 B. & Cr. 750; 2 Man. & R. 586.

subject. Now the same effect must follow with respect to this statute. The 28th section of 7 & 8 Geo. 4, c. 53, which is fully recited in the 4 & 5 Vict., and which gave nearly the same power to follow goods into the hands of other persons, and to charge them with arrears of duties due from any maltster, is, by the 23rd section of the latter act, altogether repealed. Now, reading the 24th section as if no prior act had ever been in existence, it could not operate upon goods over which the maltster had ceased to have any control at an antecedent period. That section enacts, "That all goods and commodities for or in respect of which any duty of excise is or shall be by law imposed, and all materials and preparations from which any such goods are made, and all stills, vats, &c., implements and articles for making or manufacturing or producing any such goods and commodities, or preparing any materials, or by which the trade or business in respect of which the duty is or shall be imposed shall have been or shall be carried on, in the custody or possession of the person carrying on such trade or business, or in the custody or possession of any factor, agent, or other person in trust for, or for the use of, the person carrying on such trade or business, shall be and remain subject and liable to, and the same are hereby made chargeable with, all the duties of excise which, during the time of any such custody or possession, shall be or shall have been charged or become chargeable on, or be in arrear or owing from or by, the person carrying on such trade or business, and also be and remain subject and liable to all penalties and forfeitures, &c.; and it shall be lawful to levy thereon such duties, penalties, and forfeitures, and for that purpose to seize, take, sell, remove, and dispose of the same as the goods and chattels of the debtors and offenders under any writ or writs of extent," and so forth. Now, supposing there had been no prior act of Parliament, this act coming into operation on the 18th of May, there could be no doubt whatever that the act would not apply

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to this transaction, because it is the same as if it had been expressly enacted, "That all goods and commodities for and in respect of which any duty of excise is," (that is, on the 18th of May), "or shall be by law," (that is, after the 18th of May), "payable, in the custody or possession of the person carrying on such trade or business," &c. &c. These goods were not in the maltster's custody or possession on the 18th of May, or at any time after that day, and therefore the effect of the act is just the same as if it had expressly enacted, that all goods which on or after the 18th of May shall be liable to any excise duties, which shall be in the possession of any party chargeable with those duties, shall be liable to be seized for the amount of duty so due. These goods, therefore, not having been in the custody of Armitage & Co. on or after the 18th of May, this act has no application. And the former act having been repealed before the writ of extent issued, which was not until the July following, the Crown cannot, under this writ of extent, pray in aid the former act of Parliament, because that act had entirely ceased to exist. [Lord Abinger, C. B.—You say the new act cannot be applied to any facts that existed before it was enacted.] Certainly. It is perfectly analogous to the cases which arose under the bankrupt laws. The 24th section has no reference to a past transaction. It is just as if, for the first time, this power had been conferred upon the Crown. Therefore, these goods having been entirely out of the custody of the maltsters before the act came into operation, the Crown cannot maintain this extent.

Then, as to the main question. The 24th section, as before stated, provides that exciseable commodities in the custody or possession of the person carrying on such trade or business, "or in the custody or possession of any factor, agent, or other person in trust for, or for the use of, the person carrying on such trade or business, shall be and

remain subject and liable to, and the same are hereby made chargeable with, all the duties of excise which, during the time of any such custody or possession, shall be or shall have been charged or become chargeable on, or be in arrear or owing from or by, the person carrying on such trade or business." And at the end of that section follows the proviso upon which the question will arise: "Provided always, that where any goods or commodities subject to any duty of excise shall have been taken account of and duly charged with duty by the proper officer of excise, and shall, after having been so taken account of and charged with duty, be fairly and bonâ fide, and in the regular and ordinary course of trade, sold, disposed of, and delivered into the possession of the purchaser thereof, for a full and valuable consideration, before the teste or issuing of any process or warrant for the recovery of any duty or penalty, such goods and commodities in the possession of such fair and bonâ fide purchaser shall be discharged from such liability as aforesaid." And it then provides, that the proof of the fairness and bona fides of the purchase, and of the same having been in the ordinary course of trade, shall lie on the claimer thereof.

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Now the only question is, whether the defendant, having received these goods into his possession under an agreement like the present, and having made advances upon the faith of those goods, may not be said to be a purchaser within the act. The words are "sold, disposed of, and delivered," and undoubtedly, in the ordinary sense of the word, this cannot be called a sale, nor can the factor, who has advanced the money, be called a purchaser. But the word "purchaser" is a term familiar to the law, and has a much more extensive signification in many cases than a mere buyer of goods in the ordinary sense of the word. It applies to estates, where a person is said to come in as purchaser, though he has never bought the estate, nor has it been sold. So, here, the question will be, whether a factor, who, under an agreement like the present, having advanced

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his money, has obtained an absolute control over the goods, and full power of selling them, so that in fact he might have sold them to himself to reimburse himself his advances, may not be deemed a purchaser within the statute. It is clear that, under such an agreement, he might have purchased the goods himself, and taken them at a fair price, if done bonâ fide, and thus have become the absolute owner of the goods, subject to a liability to settle the account with the former owners. Probably, however, the Court would hold that it would not be necessary to go through the form of a purchase, but that a person so situated might be deemed a purchaser. [Lord Abinger, C. B.—The first clause affects goods that have paid duty, and makes them liable for the general balance of duties due to the Crown from the maker. The second says, that, if goods have not paid the duty, yet, if they are bonâ fide sold, they shall be exempt from liability. Parke, B.—The strength of your argument is, that the enacting part, not the proviso, does not apply to this case. The act says, that all goods which, since the passing of the act, have been in the possession of the manufacturer, or of a person who is a mere agent or a mere factor without any lien, are liable to any arrears of duty owing by the maltster during the time of such possession either by himself or his factor; nevertheless, a bonâ fide purchaser for value is to be entitled to keep the goods, provided they have been charged with duty.] Looking at the earlier part of the section in that way, it presents itself in a more favourable point of view for the defendant; because it is difficult to imagine that the legislature intended that goods which had actually paid the duty (though it would be reasonable that as long as they remained in the maltster's hands they should be liable for any arrears in which he might be indebted to the Crown) should be followed into the hands of any other person. [Parke, B.—They might be so followed, unless that person were a purchaser for value in the ordinary course of trade. If he

takes from the maltster, he must know that the maltster has no power to pledge the goods, except under a liability to any duties that may be in arrear to the Crown. The strength of your argument is, that these goods never were, after the act came into operation, in the possession of the maltster, nor in the possession of a person who stood in the simple relation of a factor or agent, or in trust for him; because they were pledged to the defendant for the balance due to him, and he held only the surplus interest for the maltster.] That is the point, and it is submitted that the case shews they were not held in trust for Armitage, within the meaning of the statute. The words are, "in the custody or possession of any factor or agent, or other person, in trust for, or for the use of, the person carrying on such trade or business." Now, those words merely mean a factor or agent, who is, in every sense of the word, the holder of the goods on account of, and for the use of, the maker; that is, where the factor has no lien upon them, but the maker has the whole interest. The case of *Rex v. Lee* (a) shews that the Crown is not entitled to seize these goods in the hands of an agent or factor, who has advanced money upon them, and thereby acquired a lien. There an extent in chief had issued against Ogle, a cotton manufacturer at Preston, and an immediate debtor of the Crown, under which goods belonging to him, in the hands of the defendants, who were his sole factors in London, were seized by the sheriff of London. The defendants traversed the inquisition, and the Attorney-General having replied, several issues were joined, from which it appeared that the factors claimed a lien upon the goods for bills of exchange accepted by them to the amount of their value; and it was held that such lien must prevail against the Crown. *Richards*, C. B., in delivering the judgment of the Court, says, "The only question in this case is, whether the de-

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defendants, as factors, have a right to retain the goods consigned to them, as such, against the claim of the Crown. None of the authorities which have been cited are applicable to this particular point; and therefore we must consider the question purely on principle. The cases cited on the part of the Crown only prove, that, where there is an execution of a subject and an execution of the King sued out at the same time, the execution of the King shall have precedence. It is, on the other hand, stated by Lord Chief Baron *Parker*, in *Rex v. Cuther*, in *Parker's Rep.* 118, to have been agreed that, in the case of goods pawned or pledged before the teste of the extent, they could not have been legally seized. Now, by the common law, a factor has the same right to hold goods as a security for money advanced on them, and in the same manner as a pledge. The Crown's debtor himself could not have compelled the factors to give up the goods to him, without first paying them what was due. Therefore, we think that the Crown could not compel the factors to give up their lien, without paying them what money they had advanced on the faith of the consignment to their principal; consequently, judgment must be given for the defendant." Now in this case, the defendant, who has made these advances, did not hold these goods for or on account of, or for the use of *Armitage & Co.*, in the sense in which those words are used in this statute. It was only for their use, subject to his lien. The first trust was for the factor himself. He held them to his own use till the advances were paid. The doctrine laid down in *Rex v. Lee* was affirmed by the House of Lords in *Spears v. Murray (a)*, in 1839. There the Lord Chancellor, in giving judgment, cites *West on Extents*, where it is laid down that "Goods pawned or pledged before the teste of an extent cannot be taken, because the pawnee or bailee has a special property in them.

(a) *Maclean & Robinson's Appeal Cases*, 585.

Nor, for the same reason, goods demised or lent to another for a term certain, during the term. But it seems that goods pawned before the teste of the extent may be taken as against the pawnee, on satisfaction of the pledge, or taken and sold subject to the pawnee's right. In *Rex v. Sanderson (a)*, the Chief Baron says, 'the preference of the Crown can only operate upon what the partner himself had.'" And his Lordship then refers to *Rex v. Lee*, and says, "The rule upon this subject must be the same in Scotland as in this country; indeed the learned Baron so considers it;" and upon that ground judgment was given for the plaintiff in error.

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The Court will therefore see, that, in cases of claims by the Crown, the Court will take notice of the trusts, and consider whether the parties having the actual possession of the property claimed are trustees immediately and unconditionally for the Crown debtor; because the Crown can have no greater right than the Crown debtor would have in respect of the property. The very words of the act of Parliament are, "or other person in trust for, or for the use of, the person carrying on such trade or business." Now here the factors were not trustees for the Crown debtor; they were trustees for themselves; they were in possession in their own right, and held the property for their own use till their lien should be satisfied. There was no use in favour of the maltster, till the lien should be put an end to by the payment of the advances. Upon these grounds, it is submitted that the defendant is entitled to the judgment of the Court.

The Attorney-General, contra, (*Jervis* and *J. Wilde* with him).—With respect to the general construction of the statute, it seems to be conceded, that, (if it had not been for

(a) *Wightw.* 53.

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this supposed *hiatus* in legislation), as the goods had once been in the possession of the maltster at the time that the duties accrued, they would, by virtue of the act, remain liable to those duties notwithstanding any conveyance or transfer, except in the single case of an actual *bonâ fide* sale in the ordinary course of trade and business, which this was not. But there was no such hiatus, for the very clause which repealed the former statute continued the liability of the goods. There is, however, a clause in a former act (28 Geo. 3, c. 37, s. 21) similar in terms to the repealed clause in the 7 & 8 Geo. 4, c. 53, which has never been repealed, and which was as much in force at the time this lien is said to have been created, and is now, as it was at the time it received the royal assent. By that section it is enacted, "That all goods and commodities for or in respect whereof any duty of excise is by law imposed, and all materials &c. in the custody of the maker or makers, manufacturer or manufacturers, of such goods or commodities respectively, or in the custody or possession of any person or persons to the use of, or in trust for, such maker or makers &c., shall be subject and liable to, and the same are hereby made chargeable with, all the duties of excise in arrear and owing from time to time from or by such maker or makers, for or in respect of any such or the like goods and commodities respectively so made or manufactured by him, her, or them." There the words "factor or agent" are not used, but the words are, "in the custody of the maker, or in the custody or possession of any person or persons to the use of, or in trust for, the maker." Now it will naturally be asked, what became of that clause, and how was it affected when the 7 & 8 Geo. 4, c. 53, was passed, which professed to be an act to consolidate and amend the law? It was not then the fashion, as it is at present, to sweep away all prior acts of Parliament, and that statute nowhere repeals the 28 Geo. 3, c. 37; but the manner in which

the two acts are made to work together is this:—By the 127th section of the 7 & 8 Geo. 4, it is enacted, “That all laws, powers, and authorities, rules, regulations, &c., contained in any act or acts in force relating to the revenue of excise, or to any matter or thing expressly provided for by this act, which are repugnant to, or inconsistent with, the several matters, clauses, provisions, and regulations of this act or any of them, shall be and the same are hereby respectively repealed, and shall no longer be put in force.” Now there is no repugnancy between the 21st section of the 28 Geo. 3, c. 37, and the clause in the 7 & 8 Geo. 4, which is repealed by the stat. 4 & 5 Vict. c. 20. Therefore, there is not that hiatus which the defendant’s counsel supposes; for the stat. 28 Geo. 3 continued to make the goods subject to the Crown duty, notwithstanding the repeal of the clause in the 7 & 8 Geo. 4.

But there is another point. The 23rd section of the 4 & 5 Vict. c. 20, which repeals the 7 & 8 Geo. 4, c. 53, s. 28, passed *uno flatu* with the 24th section, and the moment before the statute of Victoria passed, these goods in the possession of the defendant were liable to the duty, and the lien which he has attempted to set up was posterior to the lien of the Crown; and the 23rd section expressly says, that all goods and commodities “shall be and remain subject and liable to, and the same are hereby made chargeable with, all the duties of excise which, during the time of any such custody or possession, shall be or shall have been charged or become chargeable on, or be in arrear or owing from or by, the person carrying on the trade or business.” Therefore, this act having, at one and the same moment, when it repealed the section in 7 & 8 Geo. 4, said that the goods should remain subject to the duties, it has made no alteration in the existing state of things.

But further; the statute of Victoria introduces for the first time the words “factor or agent.” In all the prior

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statutes the words were, "other person in trust for, or for the use of, the person carrying on such trade or business." These words were, therefore, put in to mean something more than the old words, "other person in trust for," &c. And the words "in the custody or possession of any factor, agent, &c.," are followed by the words "shall be and remain subject and liable to, and the same are hereby made chargeable with, the duties of excise, which, during the time of any such custody or possession, shall be or shall have been charged or become chargeable on, or be in arrear, or owing from or by, the person carrying on such trade or business." Now, it is submitted that these goods were held in trust for the trader, and that this clearly appears by the plea. For although in one sense the factor held the goods for himself, yet in reality he had only a lien, and was a trustee for the principal. And the Crown had a lien on those goods at the time the factor received them; for the demands of the Crown upon Armitage had always been, and were then, so great, that when the factor got the possession of the goods, he got them in trust for the lien of the Crown, which over-rode the whole value of the goods. Then the factor did not hold the goods in trust for himself at all; for the words "in trust for him" must mean "on his behalf," so as to be called upon to account to him. The words "in trust for, or to the use of, the person carrying on the trade" are not excluded from operating because the person carrying on the trade had created a lien. The fact of an agreement having been made, that, when the goods were sold, the proceeds should be applied to pay the bills, if in the mean time the Crown debtor had not provided funds to take them up, does not prevent the factor from holding them in trust for, or for the use of, the person carrying on such trade. The lien does not extinguish the trust. And, taking the whole section together, it is clear that the law intended to relax the right of the Crown only in respect of a bonâ fide

sale. In the case of *Rex v. Lee* (a), the acts of Parliament were never adverted to, which arose from the circumstance, (which does not appear from the report), that Ogle was not a Crown debtor in the sense in which Armitage was. Ogle was there called upon to pay a debt he owed to the Crown, as having in his possession a fund which a collector of the revenue had placed in his hands. But he was not an excise trader, and none of these acts applied to him, and there was nothing upon which any Crown lien could attach. They were not exciseable goods. It has therefore no bearing upon the present case. [*Parke*, B.—It only established that a person, who had a lien quite independently of the excise laws, as against the Crown debtor, had a lien as against the Crown. *Alderson*, B.—Here you say, as against a third party, A. B., the defendant held the goods in trust for himself, because he had a lien; but as against the Crown, it was in trust for the Crown debtor; because a lien does not prevail as against the Crown. It is the same as if there was no lien, as against the Crown. But then there is the repeal of the act of Geo. 4.] The law was not repealed. [*Lord Abinger*, C. B.—You say there was a clause in the 28 Geo. 3, that affected these goods in the hands of the factor, and that that law is not repealed.] Yes. By the 28 Geo. 3, c. 37, s. 21, it is enacted, that all goods in respect whereof any duty of excise is by law imposed, “in the custody of the maker, &c., or in the custody or possession of any person to the use of, or in trust for, such maker, &c., shall be subject and liable to, and the same are hereby made chargeable with, all the duties of excise in arrear and owing from time to time from or by such maker, &c., for or in respect of any such or the like goods and commodities respectively so made or manufactured by him, her, or them, and shall also be subject to all fines, penalties, and forfeitures, &c.” Now, after the passing of that act, and

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whilst it was in force, (for it has never been repealed), these goods in the custody of the maltster had become subject to duty, and therefore they are subject and liable to duty, into whose custody or possession soever they come, and, to use the language of the 24th section of the recent act, "by whomsoever and by whatsoever title or conveyance the same may be claimed." The defendant must contend that, at the time of the passing of the act, the goods were in his possession as factor, not in trust for Armitage, but in trust for himself; but that is not the true construction of the act. The correct construction is, that they were in his possession in trust for Armitage, notwithstanding there might be a lien on the part of the factor.

Kelly, in reply.—First, the clause by virtue of which these goods in the hands of the factor would be made liable to these duties was repealed and ceased to exist altogether on the 18th of May, 1841; and then the question is, whether the act re-enacting that clause must not be taken, like the Bankrupt Act, to be construed as if it had been passed for the first time on that very day. [Lord *Abinger*, C. B. —Do you say that the duties were repealed? If it were so, your argument would be complete.] No, it is admitted that the duties remained payable, as the clauses imposing them remain unrepealed. But the clause enabling the Crown to follow goods once in the possession of the maltsters into the hands of other persons, who may have acquired a lien on them, was repealed; and the mere continuance of the law imposing the duties, and the liability of the maltster to those duties, and of the goods in the hands of the maltster, cannot confer upon the Crown the right to follow goods, which were in the hands of the maltster while the duties accrued, into the hands of another person who has acquired them by a valid title. This argument, as to the repeal of that clause, is, however, endeavoured to be disposed of by reference to the old act of

28 Geo. 3, which it is said is not repealed, and which, it is contended, gives to the Crown the power of following the goods charged with the duties into the hands of a factor under the circumstances stated in these pleadings. But that statute gives no such power. The effect of it was to enable the Crown to attach goods liable to excise duties for any arrears that might become due while those goods remained in the hands of the trader, but no longer. There is no power to follow goods from the hands of the Crown debtor into the hands of any other person whomsoever. That power was given for the first time by the 7 & 8 Geo. 4, c. 53. The preamble to the 21st section of the 28 Geo. 3, c. 37, merely recites, that it is expedient that all goods and commodities in the hands of a trader shall be liable to duties which he may owe, and to fines and penalties which he may incur; and it enacts, that goods in the custody of the maker, or of any person to his use or in trust for him, shall be subject and liable to all duties of excise owing from the maker, in respect of such or the like goods: whereas the 7 & 8 Geo. 4, c. 53, s. 28, recites a larger object, viz. that it is in order to secure the duties of excise from time to time, which shall have become payable by any such trader; and its enactment is in words almost identically the same with the 28 Geo. 3, c. 37, s. 21, down to the words "shall be liable:" it then introduces the word "remain,"—"shall be and *remain* subject and liable." [*Alderson*, B.—Under the 7 & 8 Geo. 4, the goods would have been liable in the hands of a bonâ fide purchaser for value.] It would have been so still but for the proviso in the 24th section of 4 & 5 Vict. c. 20. The 7 & 8 Geo. 4 effected a large increase in the security of the Crown. [*Alderson*, B.—You say they would not be liable under the 28 Geo. 3.] Not at all. The statute 7 & 8 Geo. 4 provides, that the goods in the hands of the trader, or of any one on his behalf or for his use, not only shall be, but that they shall remain, liable to those duties.

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And then follow the words "into whose hands soever the same shall afterwards come." Under the old statute of Geo. 3, the goods would only be liable in the hands of the trader, or of a person in trust for him or to his use, but they would cease to be liable when the trader transferred the title to the possession of the goods to another person, so as to give him a lien upon the goods. [*Alderson, B.*—Your main position seems hardly arguable, that goods subject to duties can be transferred to a factor, and the factor have a lien upon them, and so the maker save himself from the payment of duties.] That, after such an expression of opinion, will not now be contended for. [*Lord Abinger, C. B.*—Your argument is, that the words in the stat. 28 Geo. 3, "in the custody of the trader or of any person to his use or in trust for him," would not apply to a case where the factor held the goods in trust for himself, and therefore would not affect the lien of the factor properly obtained; but that the 7 & 8 Geo. 4 rendered them liable in the custody of any person, by whatever title they come into the hands of that person. But that, in the last act, seeing the difficulties which it exposed a bonâ fide purchaser to, that clause of the 7 & 8 Geo. 4 was omitted, so as to let in the claim of a bonâ fide purchaser; and therefore the question recurs to the words of the 28 Geo. 3, which are to be construed in the same manner, so as to let in an equitable title.] Just so. But, further, that the stat. 4 & 5 Vict. has entirely repealed the former act. It therefore comes back to the question, whether, when the act of 7 & 8 Geo. 4 was repealed, which the defendant now admits would have made these goods liable in the hands of the factor, notwithstanding the agreement and the claim of the factor in respect of his lien, that liability did not altogether cease. It is clear, that, if the 4 & 5 Vict. had contained only the 28rd section, and by that section the provision of the 7 & 8 Geo. 4 had altogether ceased to be law, and there had been no new enactment, the Crown

never could have attached these goods for the moment that provision was repealed, the power which the Crown had under that statute to follow the goods, and to attach them in the hands of the factor, altogether ceased, and, without a new enactment, could not be revived.

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And then comes the question, whether, by the new enactment, any old power is revived, or whether it is anything more than the new and first creation of a power. The words of the statute contain no retrospective expressions. It is a provision to operate from the time the act itself comes into operation. It imposes a liability for the first time, which did not before exist; and it is submitted that it would be a violation of the terms of this statute, to hold that it made any goods liable to the provisions of it, except such as, after the act came into operation, the act itself brought within the terms of it. These goods, at the time it came into operation, were not within the terms of it at all; and therefore the Crown cannot support this extent.

Jervis, in reply, for the *Attorney-General*.—The goods in question were, in the terms of the stat. 28 Geo. 3, goods and commodities in respect whereof the duty of excise is by law imposed, and were in the custody of the maker at the time of the subsequent duties accruing; and, by that statute, they are to be subject and liable to the duties for goods made after those particular goods have paid duty. It is said, that, because the word “remain” is not there, they are not to continue liable. But the defendant has omitted to notice the subsequent words, “and the same are hereby made *chargeable* with all the duties of excise in arrear and owing from time to time from such maker.” Now, the effect of these goods being made chargeable and liable to the duties is in effect to say, that, if a maltster, having in his possession goods which have paid duty, subsequently becomes in arrear for other goods of an exciseable

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quality, all the goods which are in his possession must be taken as if they had not paid duty at all until he has paid the amount due to the Crown; and the goods which have paid duty are liable to all the duties accruing subsequently, and are to be put in charge in respect of those duties; and, on the construction of that statute, they may be followed into the hands of any body, whether a bonâ fide purchaser or not. They remain liable for ever until the maker discharges himself from liability by the payment of the duties in arrear. The proviso in the 24th section of the 4 & 5 Vict. is confirmatory of this view, and is for the benefit of the subject. The learned counsel for the defendant does not contend that the stat. 28 Geo. 3 is repealed. And when the goods are once subject and liable to the payment of duty, a common-law right attaches in the Crown to seize them by extent. Here the plea admits that these goods were in the hands of the actual maker at the time of the subsequent duties accruing. They were, therefore, clearly liable to this extent.

Then, with respect to the recent statute, it is submitted that the goods were liable under it as being in the hands of the factor. They were goods in respect of which, at the time of the passing of this act, duty was chargeable, and they were to remain liable, if they were in the hands of any body within the meaning of the statute. Now the proper way to construe the act is to read the word "factor" unencumbered of the words "other person in trust for, or for the use of;" and it will then run thus: "That all goods and commodities, in respect of which any duty is imposed in the custody and possession of any factor, shall be and remain subject and liable to, and the same are hereby made chargeable with, all the duties of excise which, during the time of any such custody or possession, shall be or shall have been charged or become chargeable on, or be in arrear or owing from or by, the person carrying on such trade or business;" that is, from the maltster; and they are

to be subject to all the duties which, during the time of any such custody, shall have been charged or become chargeable upon them.

But here the Crown stands upon its office found, and it is the duty of the defendant to defend himself against every possible construction which would entitle the Crown to the goods; and he must shew that he was a party not holding in trust for the maltster. The plea, however, only alleges that he was a factor with a lien upon the goods. But a lien does not alter the nature of the property. There is no difference between the lien of a factor for advances, and the lien of a tradesman in respect of goods sent to him to be made or repaired. A coachmaker may hold my carriage, or a tailor my coat, till I have paid my bill, but it is nevertheless my property, and he holds it in trust for me. The nature of the property is not changed, but the right to demand possession is deferred until his claim is satisfied. This plea only shews that the party is a trustee upon condition that the owner's right to have the goods shall not vest until the lien is satisfied. It leaves the property as it was, for the holder cannot sell it. Therefore a mere allegation of a lien is no answer to the claim of the Crown. The factor had no power of selling the goods, except in the event of the maker not honouring the acceptances, which having been renewed, the defendant never acquired the power to sell till after the teste of the extent. He is not even a factor, but a mere pledgee, having no right to do any thing with the goods. [*Parke, B.*—My difficulty is this, whether the words "in trust for" are to be construed in the same way as the terms used in the extent, in which the direction is to seize any goods or chattels belonging to the debtor. If the construction is the same, the factor who has a lien upon the goods does not hold them in trust for the debtor, because it was settled in *Rex v. Lee* (a), that a factor has a right of his own, and that they are not

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seizable as goods in the hands of the debtor.] The stat. 28 Geo. 3 did not apply in that case. [*Parke*, B.—It does not necessarily follow that the construction of the words is to be the same, but if it is, *Rex v. Lee* is an authority, for a factor does not hold the goods in trust for the debtor, within the meaning of that term in the extent.] Even according to the strongest way of putting that case, the Crown has a right to seize, subject to the lien. In the *Attorney-General v. Fort* (a), where a sheriff had seized the goods of a debtor under a fi. fa., and executed a bill of sale of them to the creditor, and given him possession, and a *levari facias* then issued by the Crown for penalties incurred by the debtor, it was held, that, if any of the goods included in the bill of sale had been made chargeable with the duties of excise in arrear, the Crown would be entitled to a verdict for the value of those goods, notwithstanding the sale. [*Alderson*, B.—One great difficulty is this: on the 17th of May, the day before the last act passed, the party was under the 7 & 8 Geo. 4, c. 53, s. 28. At that time, though the defendant had made advances, yet he was not a person who was in possession in trust for the maltster, because the advances he had then made were not advances which he could claim as against the Crown; and so it continued up to the time when that act ceased. But the moment that act ceased, the same enactment took place under the act of Victoria, and therefore there is no interval of time in which his lien ever arose, inasmuch as he had it not before nor after the statute passed.] A lien never arose unfettered by the provisions of the statutes.

Cur. adv. vult.

The judgment of the Court was now (Jan. 30) delivered by

Lord ABINGER, C. B.—This was a writ of extent issued

(a) 8 Price, 364.

to recover a debt due to the Crown from a maltster of the name of Armitage. The goods which are the subject of this discussion were seized in the hands of Trueman, the defendant. Those goods consisted of certain malt manufactured by Armitage. Trueman was allowed to plead to the extent, in order to state his interest in the goods; and it appeared by the plea, that the malt in question, after being manufactured, had the duty charged upon it, and that the duty chargeable upon that specific malt was paid. It was then deposited with the defendant Trueman, upon a contract that he was to accept certain bills of exchange on the part of Armitage & Co., and that the malt was to be held by him as a pledge for the payment of those bills of exchange; and, in case the bills of exchange were not paid, he was then, and then only, to be at liberty to sell the malt. It appears that the bills first accepted were paid, and the contract was renewed, and further bills given, for which the malt already deposited was held as a pledge. Pending the period before the second set of bills became due, the malt was seized. Then it appears, that, after those goods had been so deposited, the act of Parliament upon which this seizure was founded was passed, which is the act 4 & 5 Vict. c. 20; and it was alleged, in the argument on behalf of the defendant, that that act, having repealed the act immediately preceding (the 7 & 8 Geo. 4, c. 53) which imposed the duty, had repealed it at the very same moment when the new act came into operation; and that, at the time when these goods were seized, they had never been liable to the duties under the former act, because that had been repealed; and it was insisted that no duty had been incurred under the new act, and that, therefore, the case was like some of those cases which have occurred under the Bankrupt Act, 6 Geo. 4, c. 16, which repealed the former bankrupt law. It has been held, in several cases, that a fiat could not be sustained which had been

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issued under the new bankrupt law, founded upon an act of bankruptcy which had taken place before that act passed; and so it was contended, that no duty had attached upon these goods, because, the former act having been repealed, that was to be considered as a nullity, and the new act was prospective, and did not apply to cases which occurred before the new act. That argument was undoubtedly very plausible and ingenious, and it might perhaps have been a considerable question, whether the words "in the custody or possession of any factor or agent, or other person in trust for the maltster," could be considered as applying to this particular case; because the defendant was not a factor; he had no power of sale. He was clearly not an agent. He was not a servant of the maltster, nor could he be said to hold the goods in trust for the maltster. He was a mere pawnee. A mere pawnee is neither a factor nor an agent, nor does he hold the goods in trust for the principal, the owner, and consequently he does not come within those words of the act. And if the case had rested entirely upon that argument, undoubtedly there would have been great ground for saying that the defendant had succeeded in establishing his case.

But in the course of the argument it was suggested, that, although the act of Parliament of the 7 & 8 Geo. 4 had been repealed, yet the act of the 28 Geo. 3, c. 37, was not repealed; and in that act, which was still in force, being in *pari materia*, and not materially altered by the act of Geo. 4, in the 21st section, it is said, "Whereas it is expedient that all goods and commodities, for or in respect whereof any duty of excise is by law imposed, and also the materials, preparations, utensils, and vessels in the custody of the maker or makers, manufacturer or manufacturers, of such goods and commodities respectively, should be subject and liable to duties of excise in arrear and owing from

time to time by such maker or makers, manufacturer or manufacturers, and also subject to all fines, penalties, and forfeitures," and so on; then it is enacted, "that all goods and commodities, for or in respect whereof any duty of excise is by law imposed, and all materials, preparations, utensils, and vessels in the custody of the maker or makers, or manufacturer or manufacturers, of such goods or commodities respectively, or in the custody or possession of any person or persons, to the use of, or in trust for, such maker or makers, or manufacturer or manufacturers, shall be subject and liable to, and the same are hereby made chargeable with, all the duties of excise in arrear and owing from time to time from or by such maker or makers," and so on; so as to make all goods of that description liable to arrears of duties, as well as to the duties imposed upon the particular commodities.

Now, this act being in force, what was the state of things when these goods were transferred from Armitage to Trueman? They had been in the hands of Armitage, the original manufacturer of the malt, clearly liable not only for the specific duties chargeable upon them, but for all the duties for which he was responsible at that time. That being so, then by virtue of this act they were transferred to the possession of Trueman, subject to that liability, though he was the pawnee, and had a special interest in these goods; that interest he took subject to the claim of the Crown, to which these goods were liable under the act of Parliament.

It appears to us, therefore, upon consideration of the whole case, that the judgment must be for the Crown. It was stated that the case of *The Attorney-General v. Fort* (a) decided the same question; but it appears to me that, without any authority, the matter is perfectly plain, that the goods being once chargeable by the spirit of all the acts of

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(a) 8 Price, 364.

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1843. bonâ fide sale, which had not taken place in this case.

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My Brother *Parke* thinks that the point taken in *Attorney-General v. Fort* was exactly the same as here.

Judgment for the Crown.

June 10.

SELICK *v.* TREVOR and DAVIES.

One W. T. being possessed of certain copyhold premises, mortgaged the same to P., and by the indenture of mortgage covenanted to surrender them into the hands of the Dean and Chapter of W., the lords of the manor, to the use of the defendant, who was to be a trustee to sell the premises, in the event of default being made in payment of the mortgage money. W. T. made no surrender in pur-

ASSUMPSIT for money paid by the plaintiff for the defendants, and for money had and received by the defendants to the use of the plaintiff.

Plea, non assumpsit.

At the trial before *Atcherley*, Serjt., at the last Spring Assizes for the county of Somerset, it appeared that the action was brought to recover back a deposit paid on a sale of certain copyhold property, on the ground that a good title had not been made out. It appeared, that one William Tripp, being possessed of certain copyhold property held by him under the Dean and Chapter of Winchester, as lords of the manor of Bleadon and Priddie, by indenture, dated the 8th of May, 1821, and made between himself of the first part, Thomas Powell of the second part, and the defendant Trevor of the third part, mortgaged the same to Powell, and covenanted to surrenderance of the above indenture, but died after devising all his real property to certain trustees; subsequently to the death of W. T., the lords of the manor, at the nomination of the defendant, granted the property in question to certain persons upon the said trusts, &c. mentioned in the indenture of mortgage. W. T., in his lifetime, surrendered other property to the lords of the manor, by way of mortgage to C., in consideration of a loan of £100, and by an indenture of even date, covenanted, amongst other things, to repay the money borrowed, and gave the mortgagee a power of sale, in case of default in payment of the money. That indenture was stamped with an ad valorem stamp of 1*l.* 10*s.* The defendant sold the whole of the above property to the plaintiff under the following conditions of sale:—that he should deduce a good title to the premises for the lives by which they were held under the Dean and Chapter of W.; but that no earlier or other title should be deduced, or any deed or document produced anterior to the last copy of court roll, by which the premises were granted:—*Held*, first, that the defendant shewed no title in himself, as no surrender of the premises had been made to his use by W. T., and that the vendee was not precluded by the conditions of sale from making this objection to the title, as it appeared on the face of the abstract delivered. Secondly, that the stamp of 30*s.* was sufficient.

der it into the hands of the lords of the manor, to the use of the defendant Trevor, with power to Trevor to sell the same in the event of default being made by Tripp in payment of the principal money to Powell, the mortgagee. Tripp died in October, 1841, without having surrendered the premises to the lords of the manor; and by his will, dated in September, 1841, devised the premises and all his real estate to J. Corfield and G. Edwards, in trust to sell or mortgage the same. By copy of court roll, of the 26th of May, 1842, the Dean and Chapter of Winchester, by their steward, granted the premises to J. Tripp, H. Tripp, and J. H. Tripp, at the nomination of the defendant Trevor, the trustee for sale, upon the trusts and for the intents and purposes mentioned in the mortgage deed of the 8th of May, 1821. On the 10th of June, 1837, W. Tripp, in consideration of £100 advanced to him by J. Colston, made a surrender, by way of mortgage, of other copyhold property to the lords of the manor, the same to be void on repayment of the sum borrowed; and by a deed of even date, covenanted to repay the sum of £100, and that, if default should be made by him in payment of the money borrowed, Colston should have power to sell the premises. The deed of the 10th of June, 1837, giving the power of sale, was stamped with an ad valorem stamp of 1*l.* 10*s.* The premises mortgaged to Powell, and those surrendered for the benefit of Colston, consisting of lots five and six, were put up to auction, and purchased by the plaintiff, under, amongst others, the following conditions of sale:— That the vendors should prepare and have ready for delivery an abstract of their title, and, “subject to these conditions, shall deduce a good title to the premises sold, for the lives by which the same copyhold premises are now holden under the Dean and Chapter of Winchester; but no earlier or other title shall be deduced, nor any deed or document produced anterior to the last copy or copies of court-roll, by which the same copyhold premises respect-

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ively were granted, and are now holden for the lives therein mentioned respectively, or such of them as are now living; nor shall the vendors be required to produce the court-rolls of the said manor of Bleadon and Priddie, or to produce or give any evidence of the title of the said Dean and Chapter, under whom the same is holden as lords of the said manor; nor shall any purchaser be at liberty to question the right of the lords of the said manor to grant such copy or copies respectively: and, on payment of the remainder of the purchase-money, the vendors shall appear at the next manor court, and surrender in due form." The defendants having delivered an abstract setting forth the title as above stated, the plaintiff refused to complete the purchase, on the grounds, first, that the defendants Trevor and Davies had not shewn any title in themselves to sell, no surrender of the premises in question having ever been made from W. Tripp to the use of Trevor; and secondly, that the deed of the 10th of June, 1837, was void for want of a proper stamp, as a stamp for 1*l.* 15*s.* was required by the Stamp Act. The plaintiff thereupon demanded back the deposit money, and, on the defendants' refusal to return it, brought the present action to recover the amount. The above objections were insisted upon at the trial; and the plaintiff obtained a verdict, leave being given to the defendants to move to enter a nonsuit or a verdict for them.

Bompas, Serjt., having in Easter Term last obtained a rule accordingly,

Crowder and *Butt* now shewed cause.—The title to these premises was clearly defective, and the defendants Trevor and Davies had no title to convey them. They could have no such right, because Tripp never surrendered the premises to the use of Trevor, but, by his will, devised the legal estate to Corfield and Edwards; and although the lords of the ma-

nor have assumed to grant the premises, they could have no title to do so until a surrender had been made of the property into their hands; for, as *Parke, J.*, said, in *Doe d. Tunstill v. Bottriell* (a), if a surrender be void, an admittance under it is mere waste paper (b). But it will be said that, admitting the defendants to have no legal title, the plaintiff is precluded by the conditions of sale from taking advantage of the defect. Such an argument might be well founded, if a good court-roll were shewn; but here a bad title appears on the face of the abstract itself. It is true the defendants, under these conditions of sale, would not be bound to produce any document anterior to the last court-roll; but, as a prior document appears on the face of the title deduced, the plaintiff is entitled to examine its validity. The title was here clearly defective. In *Shepherd v. Keatley* (c), where, on a sale by auction of leasehold property, one of the conditions of sale was that the vendor should not be obliged to produce the lessor's title, it was held, that the vendee, having aliunde discovered certain defects in the lessor's title, was entitled to insist on those defects. The case of *Spratt v. Jeffery* (d), which was there cited, is distinguishable; for there the vendor contracted to sell the lease and good-will in trade of a public-house and shop *as he held the same*, and the vendee agreed to accept an assignment of the lease and premises, without requiring the lessor's title; by which he clearly precluded himself from inquiring into the vendor's title.

The second objection to this title is, that the second deed of the 10th of June, 1837, giving the power of sale, was improperly stamped, and that it ought to have been impressed with a deed stamp of 1*l.* 15*s.* instead of an *ad valorem* stamp of 1*l.* 10*s.* There were two deeds of this date. The

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(a) 5 B. & Ad. 135.

(c) 1 C., M. & R. 117.

(b) See *Doe d. Sweeting v. Hel-*
lard, 9 B. & Cr. 789.

(d) 10 B. & Cr. 249; 5 Man. &
Ry. 188.

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first was a mortgage for the sum of £100, the duty on which is 1*l.* 10*s.* The second is merely a deed of covenant, and is not a deed affecting the title to lands. It is not a mortgage at all, but an instrument which comes within the general clause in the Stamp Act, providing for deeds "not otherwise stamped." But if it can be considered as a mortgage at all, it falls within the proviso in the Stamp Act, 55 Geo. 3, c. 184, schedule, title "Mortgage," which says, "that where several distinct deeds falling within the description of instruments charged with the ad valorem duty on mortgages shall be made *at the same time* for securing the payment of one and the same sum of money; the said ad valorem duty, if exceeding £2, shall be charged only on one of such deeds; and all the rest shall be charged with the duty to which the same may be liable under any more general description of such deeds." Now it is clear that this deed of covenant does not fall within the first part of the proviso, as the ad valorem duty does not exceed £2. But it falls within the latter part of the proviso, and ought in that case also to have been impressed with a stamp of 1*l.* 15*s.* [Lord Abinger, C. B.—I think the two deeds form one security; and that this is substantially a mortgage, and not being within the proviso, must be stamped with the ad valorem duty.]

Prideaux (Bompas, Serjt., with him), in support of the rule.—It is understood that it will not be necessary for the defendants to address any argument to the Court as to the point respecting the stamp. Then the rule ought to be made absolute, on three grounds. First, that the plaintiff is precluded, by the conditions of sale, from taking this objection to the vendor's title; secondly, that it does not appear that the time for making out the title has yet elapsed, the defendants having till after the next court day to make out their title; and thirdly, that no valid objection existed to the title. First, this case falls

within the decision in *Spratt v. Jeffery* (a), and is distinguishable from the case of *Shepherd v. Keutley* (b). A vendor may make any terms he pleases, and if the vendee assents to the conditions imposed, he is bound by them. Now here the condition was, that "no earlier or other title should be deduced anterior to the last copy of court-roll." The plaintiff is, therefore, precluded from objecting to any part of the title prior to the last copy of court-roll. And besides, here the purchaser is not to be at liberty to question the right of the lords of the manor to grant such copies of court-roll. The lords of the manor might have made a voluntary admission by the court-roll of May, 1842, and their title to do so would be immaterial, *Doe d. Burgess v. Thompson* (c); and the plaintiff is estopped from denying its validity. The only way in which the Court can give effect to these conditions of sale is, by deciding that the purchaser has no right to question the title prior to the last court-roll.

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Secondly, the plaintiff has brought his action too soon, for the defendants were not bound to make out their title before the next court day had elapsed, and it does not appear that that day has passed. In *Sansom v. Rhodes* (d), it was held, that where no precise time is fixed, within which the vendor is to deduce a good title, it ought to appear that he had been allowed a reasonable time. [Lord Abinger, C. B.—That point was not taken at the trial.] It was for the plaintiff to shew that a reasonable time had elapsed; but he has failed to do this, as he does not shew that the next court day has passed: and it is submitted that the defendants are entitled to insist upon this objection, as it is apparent upon the evidence, and the case was reserved generally.

Thirdly, no valid objection has been shewn to the title.

(a) 10 B. & C. 249; 5 M. & R. 188. (c) 5 Ad. & Ell. 532; 1 Nev. & P. 215.

(b) 1 C., M. & R. 117.

(d) 6 Bing. N.C. 261; 8 Scott, 544.

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A contract to sell land consists of two parts—a contract to deduce a good title, and a contract to make a valid conveyance. The former is fulfilled, if the vendor has vested in himself, or in himself and those who are bare trustees for him, the complete legal and equitable interest in the property. The rest is matter of conveyance, the non-fulfilment of which cannot be objected to by the purchaser until the time has arrived at which he is entitled to have the property vested in him, (which in this case was not until the next court day), nor until he has tendered for execution the necessary documents. In *Berkeley v. Dauh* (a) it was held, that an outstanding term to attend the inheritance, the trusts being performed, is no objection to the title, though it may be an objection to the conveyance. Here the legal estate being outstanding was no objection to the title, and the defendants would have been ready to complete the title by producing a conveyance of the legal estate.

Lord ABINGER, C. B.—The case of *Berkeley v. Dauh* was a case where a bill had been filed to compel specific performance; and it was held, that the outstanding term, although it might form an objection to the conveyance, was no objection to the title. That case does not govern the present, which is an action for money had and received, and depends upon the question, whether the defendants had a reasonable time after the contract within which to make out their title. The decision in *Shepherd v. Keatley* is applicable to this case. By the conditions of sale, the defendants are not bound to produce any earlier title-deed than the last copy of court-roll; that protects them from any other title anterior to that court-roll; but still the plaintiff is at liberty to shew aliunde that the title is void. It is said, however, that the defendants must have a reason-

(a) 16 Ves. 380.

able time to make out their title; whether they had that reasonable time in this case would be a question of fact for the jury. Now the circumstances are, that the sale took place in July 1842, and the action was not brought until the January following. It appears to me, therefore, that the defendants had a reasonable time; and it is quite clear that at the present moment the title is insufficient. I am of opinion, therefore, that the plaintiff is entitled to recover. As to the other question, I think that the proviso in the Stamp Act has no application to this case, and that the stamp is sufficient. The rule must therefore be discharged.

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ROLFE, B.—I am of the same opinion. There can be no doubt that a party has a right to stipulate that a purchaser shall take that interest only which he himself has in the premises; and in this case the vendors have stipulated by the conditions of sale, that they shall not be bound to produce a title anterior to the last copy of the court-roll. They then go on to stipulate, that they shall not be bound to produce or prove the title of the lords of the manor, the Dean and Chapter; their intention being that the last copy of the court-roll only shall be produced, and that the title of the Dean and Chapter shall not be ripped up. But here the title which they did produce is defective on the face of it, and it never could have been intended that the purchaser should be precluded from objecting to the title which the vendors should produce, if defective. As to the other point, I think that the two documents of the 10th of June, 1837, constituted but one mortgage, that they do not fall within the proviso in the Stamp Act relating to mortgages, and that the stamp is sufficient.

Rule discharged.

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By a court of requests act it was enacted, that no action should be brought for any matter done in pursuance of the act until a month's notice of action should be given, &c., and if in such action it should appear to be so done, the jury should find for the defendant, and upon such verdict, or if the plaintiff should become nonsuited, "or if upon a verdict or demurrer judgment shall be given against the plaintiff, the defendant should recover treble costs." The defendant obtained a verdict without having given any evidence, the plaintiff having failed to establish any case:—*Held*, that the defendant was entitled to treble costs without entering a suggestion on the roll, or having given the act of Parliament in evidence at the trial.

FORMAN v. DAWES and Another.

TRESPASS for seizing the plaintiff's goods, under an execution issued out of the Wolverhampton Court of Requests. Plea, not guilty, by statute.

At the trial, the plaintiff completely failed in establishing his case, and the jury found a verdict for the defendants, without any evidence having been adduced on their part.

By the 48 Geo. 3, c. cx. (local), intituled "An act for the more easy and speedy recovery of small debts within the township of Wolverhampton, and the several parishes and places therein mentioned," it is enacted, (by s. 52), "that no action shall be brought against any person for anything done in pursuance of this act, until notice thereof shall have been given &c. at least one calendar month before the suing out and serving of the same &c.; and the defendant or defendants in such action shall and may plead the general issue, and give this act and the special matter in evidence, and that the same was done in pursuance and by the authority of this act; and if the same shall appear to have been so done &c., then the jury shall find for the defendant or defendants; and upon such verdict, or if the plaintiff or plaintiffs shall become nonsuited or discontinue such action, or if, upon a verdict or demurrer, judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall and may recover treble costs." The Master having, in pursuance of the above act, taxed treble costs in favour of the defendants in this cause, *Godson* obtained a rule to shew cause why the Master should not review his taxation, and reduce the amount, on the ground that the defendants were not entitled to treble costs, as they had not entered any suggestion on the record, and had not given the act in evidence at the trial.

W. J. Alexander (*Talfourd*, Serjt., with him) now shewed cause.—First, a suggestion was not necessary; for the statute does not require it. The statute says, that if, upon a verdict or demurrer, judgment shall be given against the plaintiff or plaintiffs, the defendant shall recover treble costs. The defendants having succeeded at the trial, the judgment is regular, without any suggestion being entered; and it would not appear from the judgment whether treble costs had been charged or not: *Wells v. Ody* (a). In that case *Parke*, B., says, “There are some cases in which a suggestion must be entered up, as where the defendant seeks to deprive the plaintiff of costs under the court of requests acts; but here the judgment would be regular without such suggestion being entered. If the defendant entered up judgment for treble costs, the Court could not see from the judgment whether he had charged treble costs or not. It was held, in *Finlay v. Seaton* (b), that neither a certificate from the Judge, nor a suggestion on the roll, is necessary to entitle a defendant to double costs under the 11 Geo. 2, c. 19. There the words in the statute are, shall ‘recover double costs.’ I do not say whether it is not necessary to enter a suggestion in the present case. If the words had been ‘shall recover treble costs,’ it is quite clear, on the authority of that case, that it would not have been necessary to do so.” That judgment is expressly in point, and is decisive to shew that no suggestion was necessary here. But then it is said, that the defendants, in order to entitle themselves to treble costs, ought to have given some evidence to bring the case within the act. But it sufficiently appeared that they were proceedings under the act. Notice of action had been given, and the plea was, not guilty *by statute*. It was not necessary to produce the warrant to shew that the goods were seized under the execution, as it was clear, from the plaintiff’s

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(a) 2 C., M. & R. 184.

(b) 1 Taunt. 210.

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own shewing, that it was so, and that the seizure was justifiable, and therefore the trespass was not proved. It was not denied before the Master, that this was an action for a matter done in pursuance of the act.

Godson, in support of the rule.—As the warrant was not put in and proved, the Court has no judicial knowledge that the proceedings were for anything done under the act: and the defendants are in the same situation as if this were a simple trespass, and the words “by statute” were not added to the plea of not guilty. The defendants not having given any evidence to shew that their defence was under the act, and no certificate of the Judge having been produced to that effect, the Court has no judicial knowledge that the defendants are entitled to treble costs, and they ought not to be allowed.—He referred to the ruling in *Forman v. Dawes* (a), on the first trial of this cause.

Lord ABINGER, C. B.—I am of opinion that this rule ought to be discharged with costs. I think the Court granted the rule without sufficiently considering the merits of the application; for it appears to me, upon consideration, that there was no ground or pretence whatever for it. The words of the act of Parliament are precise, that if an action is brought for any matter done by virtue of this statute, the plaintiff shall give one month’s notice of the action before he brings it, and that he shall be punished, if he be nonsuited, or a verdict pass against him, by the payment of treble costs to the defendant. According to Mr. *Godson’s* interpretation of the act, if the plaintiff is nonsuited because he fails to give any evidence at all, the party who defends the action never can recover treble costs. Then what is the meaning of the act of Parliament? The record does not state that the action was brought for a matter done

(a) 1 Car. & Marshm. 127.

in pursuance of the act, and there was no plea that a notice was served to that effect. But suppose there was a plea to that effect, then, according to Mr. *Godson*, that plea ought to be proved before the defendant can derive any advantage from the act. But if that be so, what becomes of all the provisions in the statute about a nonsuit? This is precisely a case where a verdict is given against the plaintiff, because he did not prove his notice of action under the statute. But it is said that a suggestion ought to have been entered. It is not, however, usual for any application to be made to the Court upon the subject of a suggestion; indeed, no suggestion is necessary merely to increase the costs, because the costs are dependent upon the record; and certainly the Master, in this case, has followed the usual course, where it appeared to him, on the admission of the parties or upon affidavit, that the action relating to the matter in question had its origin from an order or judgment of the court of requests. That course is, to look at the statute, to see what should be done with the case with respect to the costs. That is the ordinary practice, and the Master could not do otherwise. I think there was no ground, therefore, for this rule, and that it must be discharged with costs.

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GURNEY, B., concurred.

ROLFE, B.—When Mr. *Godson* moved the rule, it was upon two grounds: first, that the statute did not give costs when the defendant did not give evidence; and secondly, that the Master had not taken the proper course to adjudicate upon the costs.

With regard to the first point, that the defendant had given no evidence, and therefore that he was not entitled to the costs, I apprehend that is not required. The defendant is not obliged to give evidence to entitle himself to costs. That impression may have arisen from an ex-

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pression found in this act of Parliament, and in many others—an unhappy expression, that a party “may give this act and the special matter in evidence;” but that means, I apprehend, that the party may plead the general issue, and, without reference to the general rules of pleading, give the special matter of defence in evidence; but it does not mean that he is to give evidence if nothing calls for an answer from him. And it is conclusive that such is its meaning, that the defendant is equally to have treble costs if the plaintiff be *nonsuited*.

Then the second point was, whether the Master has taken the proper means in deciding as to the costs? I think he has, because, as my Lord has said, it is not necessary to have a suggestion to entitle a party to treble costs. If the losing party is to have some costs given to him, then it is necessary to have some suggestion on the record; but that is not the case here. The decision of the Master, certainly, is in conformity with the ordinary proceeding.

Rule discharged.

June 13.

MARTIN v. DAWES.

The venue cannot be changed upon the ordinary affidavit, in an action on an award.

And an action of assumpsit for not surrendering to the plaintiff certain copyhold premises, pursuant to an award, which directed such surrender on the plaintiff's paying a certain sum to the defendant, is an action on an award, within the meaning of the rule as to the change of venue.

THIS was an action of assumpsit, the venue in which was laid in London. The declaration set forth an award, made upon a reference of all matters in difference between the plaintiff and defendant, under an order of *Alderson, B.* By this award, dated 30th September, 1842, after reciting (inter alia) that the plaintiff had given a bond to one Barton to secure the sum of £400 and interest, and, as a collateral security, had surrendered to him certain copyhold premises within the manor of Robertsthorpe, in the county of Sussex; that the defendant had paid off the principal and interest due upon the bond in the year 1824,

and had thereupon been admitted to, and ever since continued in possession of, the premises: the arbitrators found that the balance due from the plaintiff to the defendant, in respect of principal and interest, was the sum of £214 and no more, and directed that, on or before the 25th of March then next, the plaintiff should pay that sum to the defendant, and thereupon the defendant should, at the next court for the said manor, surrender the said copyhold premises to the use of the plaintiff. The declaration then stated, in substance, that the defendant, in Michaelmas Term, 1842, obtained a rule nisi for setting aside the award, on several grounds therein mentioned, which was discharged with costs in last Hilary Term; and that thereby the defendant dispensed with the strict performance of the award in respect to the payment by the plaintiff of the £214, and gave the plaintiff a further reasonable time for that purpose; that the costs were taxed on the said rule at 15*l.* 10*s.* 6*d.*; that the plaintiff afterwards, and within a reasonable time, to wit, on &c., tendered to the defendant the balance due to him after deducting the said costs, viz. 198*l.* 9*s.* 6*d.*, but that he refused to receive the same; and that he, the plaintiff, had always been ready and willing to pay him the said sum of £214; and assigned as a breach, that the defendant had not surrendered to him the copyhold premises.

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In Easter Term (May 6),

Bramicell moved to change the venue to the county of Sussex, on the usual affidavit that the cause of action arose in that county; and contended, that this was not an action *on an award*, and therefore not within any rule which prevented the venue from being changed in such actions, and which applied only to cases where the mere production of the instrument entitled the plaintiff to recover. Here the statement of the award was merely introductory, and more was

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necessary to be averred, to entitle the plaintiff to recover. This award did not direct the surrender absolutely, but only conditionally on the plaintiff's doing an act himself, viz. payment of the balance due to the defendant. [*Parke*, B., mentioned *Whitburn v. Staines* (a).] Even if that case were considered as an authority, that in an action *on an award* the venue is not changeable, this could scarcely be said to be such an action (b). But even if this were an action on an award, *Mondel v. Steele* shewed that the venue might be changed in such action.

The Court (c) granted the rule, *Parke*, B., expressing an opinion, that, since the case of *Mondel v. Steele*, it was to be considered that the rule, which prohibited the change of venue, applied only to actions of debt or covenant on a specialty, and to bills or notes, and therefore not to an action upon an award, which, although under seal, was not a specialty.

On a former day in this term, *Hoggins* obtained a rule to shew cause why the rule to change the venue should not be discharged, on the ground that it was not a case in which the venue could be changed on the ordinary affidavit.—Against that rule

Bramwell now shewed cause.—This is in truth not an action upon the award, but upon a new agreement founded on it, and therefore, even if the venue cannot be changed in an action upon an award on the ordinary affidavit, that rule does not apply in the present case. [Lord *Abinger*, C. B.—The award does not go for nothing, because you do not proceed immediately upon it. It is the foundation of the action.] If this were an action on the award, the breach would be the not doing what the award ordered, but it is not. The award directs a reconveyance at the

(a) 2 Bos. & P. 355.
(b) 8 M. & W. 640.

(c) *Parke*, B., *Alderson*, B.,
Gurney, B., and *Rolfe*, B.

next Court after the 25th March, 1842, upon payment of money by the plaintiff on that day; but this is not the breach. But taking this to be an action on the award, the case of *Mondel v. Steele* is an authority that the venue may be changed in all actions on written contracts, except in actions of debt or covenant on a specialty, where the debt accrues by the instrument merely, and actions on bills or notes; and therefore the prohibition does not apply to an award. In that case, *Parke, B.*, in delivering the judgment of the Court, says (a), "We think it cannot be laid down as a general proposition, that the venue is not to be changed in actions on contracts appearing by the declaration to be in writing. There does not seem to be any principle, and but little precedent, in support of so extensive an exception to a general rule, which in conformity to the statute law is, that actions should be tried where the cause of action arises." It may be said, that this award is in the nature of a specialty; but although it is under seal, it is not a specialty, for it is not a deed. Even if it were, the venue might be changed, for it is not in every action on specialties that it cannot be changed. The ground on which the venue, in actions on specialties and notes, has been held not to be changeable, is well stated by *Cresswell* in argument in *Mondel v. Steele*, viz. "that a bond is a debt everywhere, and so is a bill of exchange or promissory note: the person liable upon those instruments contracts to pay in one place as well as another, and no locality can attach to them; and the defendant cannot properly say that the cause of action arose in one place more than another." In the case of a bond or note, it is almost impossible to say that proof would be required in any one county in particular. The instrument and the debt are the same thing; the instrument is the cause of action. And the instrument being in one county cannot be the reason, because it may

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be removed before the trial. The rule which was correctly applied to actions on those instruments, where the debt is due by the instrument itself, has, it is submitted, been incorrectly applied to actions on instruments where the debt was due, not by virtue of the instrument alone, but by that and the existence of collateral matters. The mistake arose from supposing that the venue was not changeable in actions on bonds, not for the reason above given, but because they were specialties. The next extension was to all actions on writings, and proceeded from a similar mistake. The reason for saying that the cause of action on a bond or note does not arise in any particular county, surely cannot apply to the present case. Here the debt does not arise on the instrument *per se*. In those actions there is no averment of place in the declaration, that might not truly be put in any county, except the making of the instruments, and it is not where they were made, but where they are, which is material, and the proof thereof arises wherever the handwriting is: but in this case there are many averments of facts which must have happened in a particular place, and the witnesses to prove them must have been in that place. *Whitburn v. Staines* (a) is not an authority to the contrary; for, independently of the refusal to grant the rule not being an absolute one, as was observed by this Court in *Mondel v. Steele*, it does not appear that it was not an award for the payment of a sum of money only, in which case the instrument creates the debt, and not, as in the present case, for the performance of some other matter. In *Arden v. Mornington* (b), where the Court refused to bring back the venue, which had been changed to Hereford, in covenant on a lease for non-payment of rent for premises situate there, *Bayley, B.*, says, "Does the principle of the rule for retaining the venue in actions on specialties apply, except where they are for payment of money?" The au-

(a) 2 Bos. & P. 355.

(b) 4 Tyrw. 56.

thorities are collected in Tidd's Practice, Vol. 1, 604, and after stating the exceptions, it is said, "But the venue may still be changed in an action upon a policy of insurance, not being by deed." Actions on awards are in truth actions on the agreements to perform those awards. The action must be on the agreement. And this is an action on the agreement to perform the award. In *Whitburn v. Staines*, the Court only intimated an opinion that the application could not succeed: they did not decide the point. And *Parke, B.*, said, when this rule to change the venue was moved for, that, since the case of *Mondel v. Steele*, it must not be taken that the venue will not be changed in an action on an award.

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Hoggins, contrà, was stopped by the Court.

LORD ABINGER, C. B.—I am of opinion that this rule ought to be made absolute. We cannot take the law from the casual expressions of judges, but must look to decided cases. The case of *Stanway v. Heslop* (a), is a direct authority that the Courts will not change the venue in an action on an award. *Abbott, C. J.*, there says, "There is not any case deciding that the venue may be changed in an action on an award, and as the contrary has been held in the Court of Common Pleas," alluding to *Whitburn v. Staines*, "we think it best that the practice of this Court should be conformable to that decision." I think the practice has been settled by those decisions. The rule will therefore be absolute, the costs to be costs in the cause.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

(a) 3 B. & Cr. 9; 4 D. & R. 635.

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June 12.

Where a landlord distrains for rent, amongst other things, goods which are not distrainable in law (as looms in work, there being sufficient without them to satisfy the rent), and the tenant pays the amount of the rent and the costs of distress, upon which the distress is withdrawn altogether; the tenant is entitled, in an action of trespass, to recover only the actual damage sustained by the taking of those particular goods, and not the whole amount paid by him.

In such a case, the distrainer is a trespasser ab initio only as to the goods which were not distrainable.

HARVEY v. POCCOCK and Others.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and therein levying, seizing, distraining, and impounding his goods, until he the plaintiff was forced and obliged, in order to release the same, to pay the sum of 8*l.* 15*s.*—Plea, not guilty, by statute.

At the trial before *Gurney, B.*, at the Middlesex Sittings in Easter Term, it appeared that the distress in question was made for 8*l.* due from the plaintiff, who was a willow-weaver, for rent of the house and premises occupied by him. Among the goods included in the inventory were six looms then at work, and without which there was sufficient on the premises to satisfy the distress. Nothing was removed, nor was any injury whatever done to any of the goods. The defendants remained in possession for five days, when the defendant paid the rent due, together with 15*s.* 6*d.* for costs, and the distress was withdrawn. The learned Judge, in summing up, told the jury that the distraining of the looms entitled the plaintiff to a verdict for the value of the goods so taken, and that it was for them to say, no damage having been proved, whether they would give the plaintiff any greater damages than the amount paid by him to redeem them. The jury found for the plaintiff, damages 8*l.* 15*s.* 6*d.*

In Easter Term, *Kelly* obtained a rule to shew cause why a new trial should not be had, or the damages reduced to 15*s.* 6*d.* or to 1*s.*

Jervis and *E. James* now shewed cause.—The plaintiff was entitled to recover in this action the full value of the goods taken, without any deduction being made for the rent. This is an action of *trespass* for the unlawful seizure of the plaintiff's goods, and not an action *on the case* founded upon an irregularity in the conduct of the dis-

tress. The taking of the looms, there being a sufficient distress without them, made the defendants trespassers ab initio. The stat. 11 Geo. 2, c. 19, s. 19, is a legislative declaration of the pre-existing law, both as to actions of trespass and on the case for an illegal seizure of goods as a distress. The preamble states, that "whereas it hath sometimes happened, that upon a distress made for rent justly due, the directions of the stat. 2 W. & M. c. 5, have not been strictly pursued, but through mistake or inadvertence, &c., some irregularity or tortious act hath been done in the disposition of the distress so taken, for which the party distraining hath been deemed a trespasser ab initio, and in an action brought against him as such, the plaintiff hath been entitled to recover, and hath actually recovered, *the full value of the rent* for which such distress was taken:" and then the clause provides, that in such cases of subsequent irregularity the distress shall not *therefore* be deemed unlawful, nor the parties trespassers ab initio; but the party aggrieved shall recover satisfaction for the special damage in any action of *trespass or on the case*. In an action on the case, therefore, for an irregularity in the disposition of the distress after it is taken, the plaintiff can recover only the value of the goods, minus the rent: *Biggins v. Goode* (a). But that case is no authority on the present occasion, because this is a void distress, for which trespass lies independently of the statute, and in which the measure of damages is the amount which the plaintiff has been compelled to pay to redeem the goods so illegally seized. In *Proudlove v. Twemlow* (b), which was an action of *trover* against a landlord by his tenant for the value of growing crops seized and sold by the landlord as a distress for rent, and afterwards cut down and carried away by the purchaser, it was held, that the landlord was entitled to deduct the rent from the damages, and that,

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(a) 2 C. & J. 364.

(b) 1 C. & M. 326.

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the crops having been sold for their full value, and for less than the amount of the rent, the plaintiff was entitled to nominal damages only. That, however, was on the ground that *case* was the proper remedy, the seizure being lawful, but the subsequent removal of the crops an irregularity within the statute. *Gillard v. Brittan* (a) shews, that where the seller of goods, which have not been paid for according to the contract, retakes them from the buyer without his consent, even though under circumstances inducing a suspicion of fraud in the buyer, the latter is entitled, in an action of trespass for such taking, to recover their full value, and the jury cannot, in estimating the damages, take into consideration the debt due to the seller, and treat it as being diminished pro tanto by the value of the goods. So, in trespass for taking goods under process on a regular judgment, but in a wrong place, into which the process did not run, the plaintiff is entitled to recover the whole value of the goods, and not merely the amount of damage which he has really sustained by their being taken in a wrong place: *Sowell v. Champion* (b). Upon these authorities, the plaintiff in this case is entitled to retain his verdict for the full amount.

Kelly and Hugh Hill, contra.—This is the case of a distress which was perfectly lawful as to all the goods seized, except the looms: it cannot, therefore, be treated as a *void* distress. The looms having been improperly seized, the plaintiff is doubtless entitled to recover in respect of any damage done by the seizure of them, but no further. The money was paid by the plaintiff to obtain the withdrawal of the whole distress, and was received as the rent in arrear. If the rent is to be taken as having been satisfied thereby, the plaintiff cannot now recover it back. Suppose the defendants, to this declaration, had pleaded

(a) 8 M. & W. 575.

(b) 6 Ad. & E. 407; 2 Nev. & P. 621.

specially a justification as to the breaking and entering, and as to the taking of all the chattels except the looms, and, as to them, had let judgment go by default; could the plaintiff have recovered any greater damages than the amount of the actual damage done by the taking of the looms? If the rent be *paid*, so that the landlord can no longer distrain for it, the only damage is for the misuser, or the inconvenience from the want, of the articles improperly taken; and as no injury was proved in this case to have been done to them, and the same costs would have been incurred in distraining those goods which were lawfully seized, the plaintiff is entitled to nominal damages only. Now, on a fresh action or distress for this rent, the plaintiff would be entitled to say that he had paid the £8 to redeem the goods, and that the landlord had received it *as rent*. The taking of the looms no doubt made the defendants trespassers *ab initio*, but only *as to those goods*, and the payment was a good payment to satisfy the rent. Where the act done is wrongful, but is so merely as to part of the goods, no wrong being done as to the residue, the wrongdoer is a trespasser as to that part of the goods only in respect of which the wrongful act was done. Thus, in *Dod v. Monger* (a), where several barrels of beer were distrained for rent, and the distrainer drew beer out of one of them, Lord Holt held, that it rendered him a trespasser *ab initio* only as to that single barrel. In all the more recent cases, where a party distraining has been held a trespasser *ab initio* for an abuse of the distress, there is none in which there was an abuse of *part only*: see *Etherton v. Popplewell* (b), *Dye v. Leatherdale* (c), *Gargrave v. Smith* (d). The words of the recital in the stat. Geo. 2, c. 19, s. 19, are remarkable: that “upon a distress made for rent justly due,” “some irregularity or tortious act hath been after-

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(a) 6 Mod. 215.

(b) 1 East, 139.

(c) 3 Wils. 20.

(d) 1 Salk. 221.

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 wards done in the disposition of the distress *so seized or taken as aforesaid.*" So, in the *Six Carpenters' Case* (a), where the Court speak of the party as a trespasser ab initio who "works or kills the distress," they evidently refer to the whole thing distrained. There is still older authority to shew, that where a distress for rent is made on things that are not distrainable in law, and there is a payment to redeem it, that is a good payment of the rent, which therefore cannot be recovered again: 2 Inst. 133, c. 15.

LORD ABINGER, C. B.—The case in 6th Modern is undoubtedly a very strong authority for the defendants. The *Six Carpenters' Case* leaves it an open question how far the party becomes a trespasser ab initio as to the whole distress by an excess as to part. It is very reasonable that he should not, but that his liability should be limited according to the doctrine laid down by Lord Holt. This is only a constructive trespass as to the looms, and yet the plaintiff is asking for damages to the amount of the whole rent. It is the same as if the goods had been sold, and the value of the looms had been returned to him. The rule will be absolute for a new trial, unless the plaintiff consents to reduce the verdict to nominal damages.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute for a new trial.

(a) 8 Rep. 146.

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DAVIES v. JENKINS.

June 12.

CASE.—The first count of the declaration stated, that whereas before and at the time of the committing of the grievances thereafter mentioned, the defendant, then being one of the attorneys of the Court of our Lady the Queen before the Justices of her Bench at Westminster, had been retained and employed, in the way of his profession as such attorney, by one David Jones, to commence and prosecute against one David Davies an action at the suit of the said David Jones, for the recovery of a certain sum of money then alleged to be due and owing from and by the same David Davies to the said David Jones; and that thereupon, to wit, on the 1st day of September, A. D. 1842, the defendant, as such attorney as aforesaid, to wit, by his agents on that behalf, sued out of the said Court a certain writ of our Lady the Queen, called a writ of summons, expressed to be issued in an action of debt at the suit of the said David Jones, and to be directed to David Davies, and afterwards, to wit, on the day and year last aforesaid, prosecuted the said action so commenced as aforesaid, and then caused such proceedings to be, and such proceedings were thereupon, had in the said action, that afterwards, to wit, on the 17th day of November, A. D. 1842, by the consideration and judgment of the same Court, the said David Jones recovered in the said action against the defendant therein, a certain debt of 5*l.* 4*s.*, and also 7*l.* 14*s.* 6*d.*, which in the said Court was adjudged to the said David Jones, for his damages which he had sustained, as well on occasion of the detention of the said debt, as also for his costs and damages by him about his suit in that behalf expended, as by the record of the proceedings aforesaid, still remaining in the Court aforesaid, more fully appears; and the defendant thereupon afterwards, to wit, on the day and year last aforesaid,

Case is not maintainable against an attorney, who, being retained to sue for a debt a person of the same name with the plaintiff, by mistake and without malice, takes all the proceedings to judgment and execution against the plaintiff, or, having obtained judgment against the right person, by mistake and without malice issues execution against the plaintiff.

In the latter case, the plaintiff has a remedy in trespass.

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sued and prosecuted out of the same Court a certain writ of our Lady the Queen, called a *fieri facias*, directed to the sheriff of Carmarthenshire, whereby the said sheriff was commanded, that of the goods and chattels of David Davies, in his the said sheriff's bailiwick, the said sheriff should cause to be levied, as well the said debt of 5*l.* 4*s.*, as also the said sum of 7*l.* 14*s.* 6*d.*, adjudged to the said David Jones as aforesaid, together with interest upon 2*l.* 12*s.* and 7*l.* 14*s.* 6*d.*, at the rate of £4 per cent. per annum, from the 17th day of November, A. D. 1842: and that the said sheriff should have that money, with such interest as aforesaid, before the said Justices at Westminster, immediately after the execution thereof, to be rendered to the said David Jones for his debt, damages, and expenses as aforesaid, and whereby the said sheriff was further commanded as therein expressed; which same writ, afterwards, and before the delivery thereof to the sheriff of Carmarthenshire as thereafter mentioned, was indorsed with a direction to levy 10*l.* 6*s.* 6*d.* and interest, as therein expressed, and 15*s.* for costs of execution, besides &c.—The count then averred the delivery of the writ to the sheriff, the procuring of a mandate to be issued by him to the bailiff of the liberty of Kidwelly, who delivered his warrant for the execution thereof to his bailiffs, Isaac Jones and David Evans; and that, at the respective times of the committing of the said grievances in this count complained of, the plaintiff was not indebted to the said David Jones in any sum of money whatsoever, nor had the said David Jones any claim or demand whatsoever against him the plaintiff, nor had the said David Jones then, or at any other time, retained or employed or authorized the defendant as such attorney as aforesaid, or otherwise howsoever, to commence or prosecute against the plaintiff any such action as aforesaid, or any action whatsoever at the suit of the said David Jones; yet the defendant, to wit, on the 1st day of September, A. D., 1842, by himself and his agents and servants in that behalf, carelessly, negligently, and

improperly, and for want of due and proper care and attention on his and their part in the premises, commenced and prosecuted the said action, and sued out the said writ of summons, and caused the said other proceedings thereupon had in the said Court as aforesaid to be taken, and the said writ of fieri facias and mandate to be issued against the plaintiff, instead of the person against whom the defendant was retained and employed to commence and prosecute the said action as aforesaid: And the plaintiff further says, that the defendant, by himself and his agents and servants in that behalf, to wit, on the said 17th day of November, A. D. 1842, so carelessly, negligently, and improperly conducted himself in the prosecution and management of the said action, and the proceedings therein, that by and through the mere negligence, carelessness, and improper conduct of the defendant and his agents and servants in that behalf, and for want of due and proper care and attention on his and their part, as to the service of a copy of the said writ of summons, and of the notice of declaration in the said action, neither a copy of the said writ, nor any such notice, was ever served on the plaintiff or any one in his behalf; and he the plaintiff did not, till after the said warrant was so delivered to the said Isaac Jones and David Evans for execution as aforesaid, know of the same proceedings, or any of them, and for want of such knowledge, he the plaintiff did not nor could, by application to the same Court, prevent the same judgment from being obtained or enforced against him the plaintiff: And further, that the defendant, by himself and his agents and servants in that behalf, so carelessly, negligently, and improperly conducted and behaved himself in the premises, that by and through the mere carelessness and improper conduct of the defendant and his agents and servants in that behalf, and for want of due and proper care and attention on his or their part, in ascertaining who was the person against whom the said

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David Jones had retained and employed the defendant to commence and prosecute an action at the suit of the said David Jones as aforesaid, the said writ of fieri facias, and the said mandate and warrant were, to wit, on the day and year last aforesaid, within the said liberty, put in force, used, exercised, and executed against the cattle, goods, and chattels of the plaintiff, to wit, by the said Isaac Jones and David Evans, the bailiffs named in the said warrant, who then, as such bailiffs as aforesaid, entered into the dwelling-house, building, and close of the plaintiff, and there seized and took in execution certain cattle, goods, and chattels, to wit, &c., then being in the said dwelling-house of the plaintiff, of great value, to wit, of the value of £50, and then remained in the said dwelling-house, buildings, and close, in possession of the said cattle, goods, and chattels, for a long space of time before the commencement of this suit, to wit, for the space of five days. The declaration then proceeded to allege special damage.

Special demurrer, assigning for causes, that the said first count is uncertain, obscure, and ambiguous, in this, that it is ambiguous whether by the allegation made in the said first count, that the defendant, as the attorney of the said David Jones, prosecuted the said action therein described, and caused such proceedings to be thereupon had in that action, that the said David Jones, by the consideration and judgment of the Court therein mentioned, recovered in the said action against the defendant therein, it is meant to be alleged that the said David Jones recovered against the now plaintiff, or some other David Davies; and that if it meant that the recovery were against some other David Davies, then the said first count is inconsistent and repugnant, in this, that, in the latter part of the said first count, it is alleged that the defendant carelessly, negligently, and improperly, and for want of due care and attention, sued out the writ in that action, and caused the proceedings thereupon to be taken against the now plaintiff; and that,

if it be meant by the said allegation in the earlier part of the said first count, that the said David Jones recovered against him the now plaintiff, then it appears thereby, as well as by the before-mentioned allegation in the latter part of the said first count, that the averment in the said first count, that at the respective times of committing of the said alleged grievances he the now plaintiff was not indebted to the said David Jones in any manner whatever, is impossible, illegal, and inadmissible, and the now plaintiff is estopped from making any such averment, because it appears on the face of the said first count, that, before the issuing and execution of the writ of fieri facias therein mentioned, the said David Jones had recovered a judgment against him the now plaintiff, for the debt and costs therein mentioned; and the plaintiff is further estopped by the said judgment so appearing to have been recovered against him, from averring that the said David Jones did not retain or employ the now defendant to commence or prosecute the said action against him the now plaintiff; and the averment in the said count, that through the careless and improper conduct of the defendant, the said writ of fieri facias in the said first count mentioned was executed against the goods and chattels of the now plaintiff, is insensible and repugnant, because there could be no carelessness or impropriety in executing the writ of fieri facias against the goods and chattels of the plaintiff, inasmuch as it appears that a judgment, upon which the writ of fieri facias issued, had been recovered against the now plaintiff: and that if it be meant by the said allegation, in the earlier part of the said first count, or by the other averments therein, that the said David Jones recovered against some other person than the now plaintiff, the present action should have been an action of trespass vi et armis, and not an action on the case, for then the damages alleged to have been sustained by the plaintiff are in substance alleged to have been the consequence of the defendants having caused a writ of fieri facias, on a

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judgment against a stranger, to be executed on the goods and chattels of the plaintiff, which would have been a mere trespass: and that the said first count is ambiguous, uncertain, and unintelligible in this, to wit, that it does not shew with sufficient certainty and clearness, but leaves it uncertain and ambiguous, whether the now plaintiff means to state as his cause of action that the now defendant improperly obtained a judgment obtained against some other person to be executed against the now plaintiff, or that the now defendant improperly obtained a judgment against the now plaintiff, without serving him with the writ of summons and notice of declaration; and also, that the said first count is too general, and bad for want of sufficient certainty and particularity, in this, that it does not state or explain in what the alleged negligence, carelessness, and improper conduct, or any or either of them, of the now defendant consisted, or in what respect he conducted himself negligently, improperly, or carelessly.—Joinder in demurrer.

The following were the points marked for argument:—The plaintiff contends that the first count is good. That it shews that the defendant, being instructed to sue another person, sued the plaintiff to judgment and execution levied. That it states a threefold injury arising from the defendant's negligence; viz. first, that he vexed the plaintiff with a groundless and unauthorized action; secondly, that the defendant so conducted that action, that the plaintiff did not know of it till after execution issued, and had no opportunity of preventing judgment; thirdly, that through the continued negligence of the defendant, the execution was actually enforced against the plaintiff. That one of these heads of complaint would sustain the action; that they are not repugnant, and all furnish legitimate elements for the estimation of damages; that there is no ambiguity; that the count states the proceedings, inclusive of the judgment and execution, just as they would appear on record, if nul tiel record had been pleaded; that the

inducement is per se certain to all intents; that the plaintiff's complaint in terms is, that these proceedings were carried on against the plaintiff instead of another person; that the plaintiff, if estopped by the judgment from denying the debt to David Jones, is so estopped only as between himself and David Jones, not as between himself and the defendant; that, for the same reason, the plaintiff is not estopped from denying that the defendant was retained by David Jones as his attorney to prosecute the said action; and further, that it does not appear that the defendant was such attorney on the record; that the estoppel, if any, should have been pleaded; that the allegation that the plaintiff was not indebted to David Jones might be rejected, without impairing the sufficiency of the count; that if the judgment had been against another person than the plaintiff, case might be maintained against the defendant, through whose negligence the officers took the plaintiff's goods in execution thereunder; that the count sufficiently states in what the negligence and impropriety complained of consisted, viz. in the want of due care in ascertaining the identity of the party to be sued.

The defendant intends to rely on this, that the said first count is ambiguous, and on the other causes and grounds specially assigned in the demurrer.

E. V. Williams, in support of the demurrer.—The declaration in this case is clearly bad in substance, and it therefore appears to be unnecessary to discuss the objections assigned as special causes of demurrer. If the plaintiff's goods have been improperly seized, he may have a remedy by an action of trespass; but this action on the case is not maintainable in law. The complaint in the declaration in substance amounts to no more than this, that the use of the process of the Court has produced loss and inconvenience to the plaintiff. There is no allegation of malice in the defendant, or of want of probable cause.

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No right of action can exist for damage resulting merely from the use of legal process, where the injury has not been committed wilfully, but has arisen out of a mere non-feasance. *Scheibel v. Fairbain* (a), *Lewis v. Morris* (b). It was expressly held in *Saxon v. Castle* (c), that in an action on the case against a creditor, for arresting the plaintiff on a ca. sa. to an excessive amount, and contrary to the terms of the defeasance to a warrant of attorney, the declaration was bad after verdict, for want of an allegation of malice. So in *Porter v. Weston* (d), where the plaintiff's attorney, in an action in which the defendant had given bail, had procured an order for the render of the defendant in discharge of his bail, it was held that the latter could not maintain an action on the case against the attorney, for obtaining the render, without averring and proving malice in fact. *Tindal*, C. J., there says—"The present case may be considered as in some degree, though not perhaps entirely, analogous in principle to those cases where a party is held to bail by a plaintiff who arrests for a sum greater in amount than that which happens to be due: there, in point of law, the party arrested cannot support an action, or be allowed to recover, if malice be not an ingredient. So, again, upon a party being arrested, and taken before a magistrate, he who is aggrieved will not have sufficient ground to support an action, if he do not shew that the opposite party was influenced and directed by some unjust motive in the improper exercise of the law. So, again, if an attorney should happen to mistake the directions of his client, conveyed in a letter, and make an arrest in consequence of such mistake, who, in such case, would say that an action could be maintained against the party who procured the arrest to be made, if there were not something more than the mere misconception of the

(a) 1 Bos. & P. 388.

P. 661.

(b) 2 C. & M. 712.

(a) 5 Bing. N.C. 715; 8 Scott,

(c) 6 Ad. & E. 652; 1 Nev. &

25.

letter—if he were not under the influence and direction of some principle of a malicious nature towards him of whose arrest he was the cause? I then come to the conclusion, that malice was a necessary ingredient in the case. The case there put by the learned Chief Justice is the very case which is disclosed by this declaration. Here the judgment was good, and the writ well executed; and it is not charged that it was wilfully issued against the plaintiff.—He was then stopped by the Court.

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J. Henderson, contra.—The plaintiff contends, that, wherever a substantial injury arises from a *negligent and careless* use of the process of the Court, that is sufficient to give a right of action, and it is not necessary that it should also be shewn to have been *malicious*. It is a general principle of law, that every man is bound so to exercise his own rights as not to occasion injury to others; and where, from negligence in the exercise of them, injury results to an individual, it is no answer to his claim for reparation, that there was no moral guilt in the act of the defendant. The cases cited are distinguishable; they were all cases of mere non-feasance; in the present case the attorney was guilty of positive negligence. Wherever a person suffers immediately and directly from the negligent, and therefore tortious, act of another, he may sue him in an action on the case: *Levy v. Langridge (a)*. The plaintiff here could not have maintained an action of *trespass*, because there is a judgment on record against him; neither could he have sued the defendant's client in the former action, who cannot be taken to have authorized the negligent act of the attorney. *Anderson v. Watson (b)*.

Lord ABINGER, C. B.—Even if this declaration were

(a) 4 M. & W. 337.

(b) 3 C. & P. 214.

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good on general demurrer, there can be no doubt that it is bad for the causes specially assigned, because it shews, on the face of it, that the cause of action, if any exists, is a *trespass* committed by executing a writ of fieri facias against a wrong person. I am of opinion, however, that the declaration is bad in substance. This action is certainly a novel attempt, and one which, if it were allowed to succeed, would be productive of numerous actions against attornies. The declaration discloses this state of things. The defendant is an attorney, who, having been instructed to bring an action against one David Davies, did so, and recovered a judgment therein. He then issued execution against the goods of the plaintiff, who happens also to be a David Davies, but a different person from the defendant in that action. Or perhaps the declaration means that all the proceedings were against the wrong person. Now, let us suppose that, by mistake, the process had been served on the wrong David Davies; he must then have defended the action, and the result would have been a verdict in his favour. On the other hand, if the process be served on the right party, but execution is issued against the wrong person, without suspicion of malice or improper motive, but by a mere mistake, and the sheriff seize his goods, that is a *trespass* for which he may bring an action, because no judgment has ever been entered up against *him*; and if he does, he will be entitled to recover, on proof that the proceedings in the action were really against another party. And this is perfectly consistent with the statement in this declaration. The plaintiff does not allege that he was served with any process until after final judgment signed; he could not, therefore, suppose that he was the party sued. The taking out a writ is nothing unless it be served, and there must be, in some form or other, ground for a judgment. Suppose the plaintiff in the former action had proceeded against a wrong

party by mistake, and without malice, the whole proceedings having originated in a mistake; can such party maintain an action against the plaintiff's attorney, without alleging and proving malice? If that were so,—if an attorney were held liable for bringing an action against a wrong person by mere mistake,—he would equally be liable, when instructed, to make inquiries whether a debt were due or not, if he came to a wrong conclusion. Such a doctrine would carry us to this extent, that in every action for debt brought against a defendant, if he obtained a verdict, he would have a right of action for negligence against the plaintiff's attorney. No such action will lie, unless the declaration charge the attorney with acting maliciously; if it were otherwise, an attorney would be liable for every mistake he made in using the process of the Court. There is no pretence for malice in this case; and if the plaintiff had applied to set aside the execution, the Court would have done so, and left him his remedy by action of trespass.

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GURNEY, B., concurred.

ROLFE, B.—There are two modes of construing this declaration: either it means that the process was in the first instance issued against the right David Davies, and afterwards that the execution was issued against another David Davies, or else that all the proceedings were against the wrong David Davies. The declaration is, therefore, bad, on special demurrer, on the ground of uncertainty. But I concur in thinking, that, in either view, it is bad in substance. In the first view of the case, the action should have been, not against the attorney, but against the sheriff for taking the goods of a party against whom no judgment had been signed. In the second view of the case, the defendant, so wrongfully sued, would have had a good defence to the action, and would have recovered his costs.

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If it be asked what further remedy he would have had for the inconvenience and trouble he has been put to, the answer is, that, in point of law, if the proceedings have been adopted purely through mistake, though injury may have resulted to him, it is *damnum absque injuria*, and no action would lie. Every defendant, against whom an action is unnecessarily brought, experiences some injury or inconvenience beyond what the costs will compensate him for.

Judgment for the defendant.

June 14.

HUTT and Others v. GILES.

Where, a defendant being under terms to plead *issuably*, the plaintiff, before the time for pleading is out, obtains an order for leave to amend the declaration by adding a particular allegation, the defendant having liberty also to plead *traversing* that allegation, and the declaration is amended accordingly, the undertaking to plead *issuably* is thereby done away with.

KNOWLES moved for a rule to shew cause why the interlocutory judgment signed in this cause, (an action of debt for a call or instalment of the defendant's subscription as a member of the Australian Land Company), for want of a plea, should not be set aside for irregularity. The declaration was delivered on the 11th January. On the 19th of January, the defendant obtained time to plead, on the terms of pleading *issuably*; which was again extended, on the same terms, on the 3rd February. On the 6th of February the plaintiffs obtained a Judge's order for leave to amend the declaration, by stating that the call in question was made (pursuant to the subscription deed) more than six months after the next preceding call: the defendant having, by the terms of the order, leave to plead a plea *traversing* the amendment. On the same day, the defendant obtained leave to plead several matters. On the 13th of February, the amended declaration was delivered, and on the 16th the defendant delivered pleas thereto, of which several were now admitted not to be *issuable* pleas: but it was contended that, by the operation of the order of the 6th of February, and the amendment of the declara-

tion pursuant thereto, the undertaking to plead issuably was no longer in force.

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Peacock shewed cause in the first instance, and contended that the order did not supersede the terms of pleading issuably: a particular plea was specified therein as being allowed to be pleaded to the amended declaration, but the order did not intend to alter any of the other terms of pleading.

Knowles, contra.—The declaration having been amended, a different record exists from that to which the defendant undertook to plead issuably. It has been repeatedly held, that such an undertaking applies only to the then state of the record, and not to subsequent pleadings: *Barker v. Gleadow* (a), *Woodman v. Goble* (b), *Children v. Mannering* (c). Suppose the amendment had introduced informal matter, could not the defendant have demurred specially? [*Rolfe, B.*—This does not differ from the cases which shew that where there is an amendment simpliciter, that does away with the restriction of pleading issuably; here there is an order for an amendment, with power to plead a particular plea; how does that differ the case?]

PER CURIAM (d),

Rule absolute, with costs.

(a) 5 Dowl. P. C. 134.

(b) 3 M. & W. 304.

(c) 8 Dowl. P. C. 120.

(d) Lord Abinger, C. B., Gurney, B., and Rolfe, B.

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Where a defendant had been arrested on a ca. sa., but was too ill to be removed from his house without danger to his life, the Court enlarged the time for returning the writ, but could not afford the sheriff any relief against the extra costs of keeping up the caption.

JONES v. ROBINSON.

IN this case, a writ of *capias ad satisfaciendum* having been issued against the defendant, and delivered to the sheriff, the officer, on going to the defendant's house to execute it, found him in bed, in a state of illness which rendered it impossible to remove him, without danger to his life. It appeared that he had been bedridden for three years, and there was no probability of his recovering so as to be capable of being removed. The sheriff being compelled, in order to avoid relinquishing the caption, to keep a man constantly at the defendant's house,

S. Temple now, on the part of the sheriff, applied to the Court for a rule calling on the plaintiff and the defendant to shew cause why the latter should not be discharged on such terms as the Court should direct.—The sheriff will not be justified in returning that he has relinquished the custody of the defendant because he could not be removed without danger to his life; for, in *Baker v. Davenport* (a), such a return was held bad. Unless, therefore, the Court will interfere to relieve him from this difficulty, it will be less expensive for him to pay the debt out of his own pocket. Either the plaintiff ought, under such circumstances, to be satisfied with security for the debt, or he ought to pay the extra costs incurred in keeping possession.

PER CURIAM.—We can do no more than enlarge the time for making the return until next term. How can we compel the plaintiff to accede to any terms we might propose? He may remain perfectly passive. Even if the defendant gave fresh security for the debt, he might, as soon as he got well, abscond and go abroad.

Rule accordingly.

(a) 8 D. & R. 606.

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POOLE v. STEED.

HEATON moved to discharge the defendant out of custody, under the stat. 48 Geo. 3, c. 123, s. 1, he having lain in prison upwards of twelve months, at the suit of the plaintiff, for a debt not exceeding £20. It appeared that the plaintiff had died during the defendant's imprisonment. Notice of this application was served on the plaintiff's attorney, who was also his son, and inquiry was made of him who was the plaintiff's personal representative, but he refused to give any information. The affidavit stated, that the defendant had made every endeavour to discover who was the plaintiff's legal representative, but without success. Under these circumstances, *Heaton* asked for a rule upon the notice given to the attorney, and referred to *Wilson v. Mokler* (a).

Where a defendant had lain in prison twelve months for a debt not exceeding £20, the Court discharged him on notice of the application to the plaintiff's attorney, who was also his son, the plaintiff being dead, and the attorney refusing to give any information who was his personal representative.

LORD ABINGER, C. B.—That case was different, because there the plaintiff was alive, and the party served with the notice was then his attorney. Under the circumstances, however, as you cannot serve the plaintiff, and the attorney refuses to inform you who is his representative, I think you may take the rule.

Rule absolute.

(a) 1 Dowl. P. C. 549.

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WATSON v. QUILTER.

June 15.

A suggestion under the Middlesex County Court Act, (23 Geo. 2, c. 33, s. 19), to deprive the plaintiff of costs, and allow the defendant double costs, on the ground that the plaintiff has recovered less than 40*s.* damages, and that the defendant was an inhabitant of and resident in Middlesex, and liable to be summoned to the county court, is traversable; and that, notwithstanding the plaintiff has previously shewn cause against a rule to enter the suggestion.

If the defendant succeeds, he will be entitled to the costs of that traverse.

A rule having been made absolute for the plaintiff to bring in the *postea*, so that the defendant might enter the suggestion thereon, the plaintiff himself entered the suggestion on the roll in a traversable form, and added a traverse:—*Held*, that this was irregular.

Where the right of a party to any costs depends upon a fact, the determination of which is not by the statute law vested in the Court, and which must be stated on the record to justify the award of costs contrary to the usual course, the fact is traversable, and may be tried by a jury.

THIS was a rule calling upon the plaintiff to shew cause why the suggestion which had been entered on the plea roll in this case, together with the traverse thereon, should not be struck out, with costs. The action was to recover a sum of £14, for goods sold and delivered, work and labour, &c., in which the plaintiff, on the trial before one of the Secondaries in London, obtained a verdict on the second count of the declaration, for work and labour, with 11*s.* damages only, the verdict on the other issues being for the defendant. In last Michaelmas term, a rule was obtained on the part of the defendant, for the plaintiff to bring the *postea* into Court, and file the plea roll, to enable the defendant to enter a suggestion on the roll, under the 23 Geo. 2, c. 23, s. 19, to deprive the plaintiff of costs, and allow the defendant double costs, upon an affidavit that the defendant, at the commencement of the action, was an inhabitant of and resident within the county of Middlesex, and liable to be summoned to the county court of that county. There being conflicting affidavits as to the facts stated in the defendant's affidavit, the case was referred to one of the Masters of the Court, who reported thereon, and the rule was made absolute. The plaintiff accordingly filed the plea roll, having first inserted in it the following suggestion, traverse, and notice of trial: "Therefore it is considered, as to the premises whereof the defendant is acquitted by the jury in form aforesaid, that the defendant go thereof without day, &c.; and it is further considered that the plaintiff do recover against the defendant the sum of 11*s.* for his damages aforesaid, by the jurors aforesaid

in the form aforesaid assessed; and hereupon the defendant alleges and gives the Court to understand and be informed, that the causes of action, in the said second count of the said declaration mentioned, arose and accrued to the plaintiff in the county of Middlesex, and not elsewhere; and that he the defendant did, at the time of the commencement of this suit, live and reside within the said county of Middlesex, and was then liable to be summoned to the county court of the said county, for the damages so as aforesaid assessed; which allegation the plaintiff denies, and says, that the said causes of action did not arise and accrue to him within the said county of Middlesex; and this the plaintiff prays may be inquired of by the country; and the defendant doth the like. Thereupon the sheriffs are commanded," &c. The present rule was obtained on the ground that the suggestion was not traversable.

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Jervis, E. James, and Lush shewed cause in Easter term, (May 10).—The question is, whether the plaintiff is not entitled to traverse this suggestion, entered under the 23 Geo. 2, c. 33, s. 19, to deprive the plaintiff of costs, and allow double costs to the defendant. Now, the suggestion involves no question of law to be determined by the Court, but only a question of fact to be determined by the jury: and the general rule is, that all questions of fact are to be determined by a jury. In the *Abbot of Strata Marcella's Case* (a), it is laid down that "Matters in law are not triable by the country, no more than matters in fact by the Justices." There is no reason here, why this, which is purely a question of fact, should be excepted from that rule. Until the doubts expressed in some recent cases, the uniform practice had been to consider suggestions as traversable. In *Barilett v. Pentland* (b), where most of the previous cases were cited,

(a) 9 Rep. 25 a.

(b) 1 B. & Ad. 704.

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Lord *Tenterden*, in delivering the judgment of the Court, says, "Wherever a person not a party to the record is to be affected by the judgment, or wherever the judgment upon the record is to be such as would not be ordinarily warranted by the previous proceedings on the record, there must be a suggestion made, by leave of the Court, in the proper form, so as to afford an opportunity to the party to be affected by it to demur, if he thinks the facts suggested are insufficient in point of law, or to plead if he means to deny them." In *Fitzpatrick v. Pickering* (a), the Court granted leave to enter a suggestion of this nature, with leave to the plaintiff to traverse it if he should think fit; and a rule was subsequently granted, that unless the plaintiff should plead to it before a stated time, the suggestion should be taken as true. In *Harvey v. Adderley* (b), also, time was given to a plaintiff to demur to or traverse a suggestion. And in *Hickman v. Colley* (c), a suggestion to entitle the defendant to costs under a similar act of 3 Jac. 1, c. 15, was demurred to and determined. In *Barney v. Tubb* (d), it was held that the Southwark Court of Requests Act (22 Geo. 3, c. 47) could not be pleaded; and that the proper mode for the defendant to avail himself of it was, by entering a suggestion on the record after verdict. There, *Buller, J.*, says, "I think it clear, that an application for leave to enter a suggestion on the record is the proper mode of proceeding: without such a suggestion, the judgment would not be warranted by the premises." And in *Jefferies v. Watts* (e), which was a rule to exempt the defendant from costs under 39 & 40 Geo. 3, c. 105, ss. 5, 12, on the ground that the cause of action had arisen within the jurisdiction of a court of requests, *Chambre J.*, says, "This act leads to many inconveniences and much expense, which was not foreseen;

(a) *Barnes*, 470.

in *Andr.* 377.

(b) *Ibid.* 471.

(d) 2 H. Bl. 356.

(c) 2 Str. 1126; also reported

(e) 1 N. R. 157.

for, instead of directing that the jury should find the fact of residence, the party is obliged to proceed by suggestion, *which is traversable*, and may lead to another trial to try that fact." *Barton v. Hunter* (a) is expressly in point. That case is thus stated by Lord *Tenterden*, in *Bartlett v. Pentland* (b):—"There the plaintiff, having recovered judgment against the secretary of the company, sued out execution against another member of the company. It appears from the report of Messrs. Hudson & Brooke, that the case was argued with great ability; and a very elaborate judgment was delivered by Lord Chief Justice *Bushe*. He there cites the case of *Hickman v. Colley*, and other cases, by which it is very clearly established, that, where the effect of an act of Parliament is to alter the law in respect of giving costs to a defendant in a case where the plaintiff, in ordinary circumstances, would be entitled to them, the proper course is to enter a suggestion on the roll of the facts necessary to entitle the defendant to those costs, so that the plaintiff may demur, if the defendant do not set forth the facts which bring the case within the act of Parliament, or may traverse those facts, if they be untrue. That is undoubtedly the practice of the courts in this country. Unless that be done, there will be an incongruity on the record; for the judgment will not be warranted by the previous proceedings." And in *Unwin v. King* (c), which was a case under this very statute, *Patteson, J.*, says, "The course is, where final judgment has not been signed, to apply to enter a suggestion to deprive the plaintiff of costs, as it cannot be entered afterwards. That suggestion the plaintiff has a right to traverse; and I cannot prevent him from traversing it." In *Ranson v. Dundas* (d), which was an application on the part of the defendant, against whom judgment for the costs of a frivolous

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(a) 1 Hudson & Brooke, (K. B. Irrel.) 569.

(b) 1 B. & Adol. 710.

(c) 2 Dowl. P. C. 593.

(d) 3 Bing. N. C. 180; 3 Scott, 497; 5 Dowl. P. C. 208.

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defence to an election petition had been entered up under 9 Geo. 4, c. 22, s. 63, for leave to enter on the roll a suggestion of the judgment, in order that the opinion of a court of error might be taken upon it, *Tindal*, C. J., says—“Suppose the plaintiffs traverse the suggestion, what machinery is provided by this act to bring the question of fact before a jury? Under the Court of Conscience Acts, the party is permitted to traverse.” On the other hand, there are two modern authorities which will probably be relied on, as being at variance with this view: the one is an interlocutory remark by *Parke*, B., in *Jorden v. Berwick* (a), that “the courts are not in the habit of ordering suggestions to be made with a view to their being traversed or demurred to. We usually decide the matter on motion to save expense.” But he does not say that a suggestion is not traversable. The other is an observation of *Maule*, J., in the case of *Bartholomew v. Carter* (b), who, on the judgment of Lord *Tenterden*, in the case of *Bartlett v. Pentland*, being referred to, asked, “Did you ever hear of the traverse of a suggestion?” Now, in this case, a great many instances have been shewn. That was probably a mere question to draw out a further answer from counsel. And there the two cases from *Barnes*, which are express authorities, were not cited. Unless the plaintiff is allowed to traverse the suggestion, he has no means of calling witnesses before the Court to disprove the fact alleged, however unfounded, in fact, it may be. [*Alderson*, B.—Why ought you to be allowed to traverse a suggestion, when you have already had an opportunity of shewing cause against its being put upon the roll?] There are various informations which are traversable, although cause has been shewn against an application to file them; as criminal informations, and informations in the nature of a quo warranto. So, a scire facias against a member of a public company

(a) 9 M. & W. 3.

(b) 1 Dowl. P. C. (N. S.) 212.

may be traversed, although cause may have been shewn against a rule to issue it. And it appears, from the report of *Hickman v. Colley*, in Andrews, 377, that there cause had been previously shewn against a rule to enter the suggestion, and numerous cases cited. It may be said that this suggestion is not in the form given in Chitty's Forms, 643, in which the record is made to award the defendant his costs, "because it is suggested and proved, and manifestly appears to the Court," that he was residing within the prescribed district; and it may be urged, that if this had been in that form, it would not be traversable; but the form there given is only a recent one, and altogether inconsistent with the cases which have been cited.

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Peacock and Charnock, contra.—The general position, that suggestions are traversable, cannot be supported, although in some cases they may be so. This, however, is not one of them, as is shewn by the circumstance that the rule to enter it is only a rule to shew cause, which would be altogether useless, if the question could afterwards be brought before a different tribunal, in the event of the rule being made absolute. Another instance is, where a fair and impartial trial cannot be had in the county in which the venue is laid; there the suggestion cannot be traversed: *Rex v. Harris* (a). Lord Mansfield, C. J., says, "As the party cannot traverse such a suggestion, when entered by rule of Court, there must be a clear and solid foundation for it." And *Denison*, J., says, "The Court will be cautious of admitting the entry of a suggestion which cannot afterwards be contradicted." [*Parke*, B.—Lord Mansfield there begins by saying, "This is to enter a suggestion on the roll with a nient de dire."] The form given in Tidd's Appendix, 391 (b), for suggestions of this kind, agrees with that in Chitty's Forms, and is "because it is suggested and proved, and manifestly appears

(a) 3 Burr. 1338.

(b) 6th Edition.

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to the Court;" which shews that it is not left to the party to traverse it. And it goes on to say, that "it is further considered that the said C. D. do recover against the said A. B. the sum of £——, for his double costs of suit." The reason of the suggestion and judgment upon it is, that it is proved to the satisfaction of the Court: but no judgment would be entered if the suggestion were traversable. On principle it is not traversable. By the Statute of Gloucester, *the Court* are to award costs of increase; and it would be error on the record if it appeared that the jury awarded costs. Therefore, according to principle, and to the practice of the Court, costs are to be awarded by the Court, and a rule to shew cause is accordingly granted for that purpose. The Court decide upon affidavits whether double costs ought to be allowed; and the Court having given judgment for double costs, are the jury to find whether the Court were right or not? The decisions that a scire facias, and not a suggestion, is the proper course under the Banking Co-partnership Act, 7 Geo. 4, c. 46, seem to have been come to under the impression that a suggestion would not have been traversable: *Cross v. Law (a)*. [*Parke, B.*—A suggestion under 13 Geo. 3, c. 51, to deprive the plaintiff of costs, because the defendant was resident in Wales, was not traversable; but there the suggestion was entered on the Judge's certificate, which was conclusive.]

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord ABINGER, C. B.—In Hilary term last, the Court made a rule absolute for the plaintiff to bring in the *postea*, so that the defendant might enter a suggestion thereon, that the debt recovered was under 40s., and that the defendant, at the time of the commencement of

(a) 6 M. & W. 217.

the action, was an inhabitant of and resident in the county of Middlesex, and liable to be summoned to the county court of that county.

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The plaintiff himself entered the suggestion on the roll in a traversable form, and added a traverse; and a rule was obtained by the defendant to set aside the suggestion and the traverse as irregular, with costs. Cause was shewn last term.

It was contended on the part of the plaintiff, that the suggestion was traversable, being of a matter of fact on which the opposite party had a right to the decision of a jury, pursuant to the general principle, that matters of fact are triable by a jury, as laid down in *The Abbot of Strata Marcella's Case* (a). In that case the general principle is laid down, but there are many exceptions to it.

On the other hand, the defendant's counsel, not disputing that some suggestions were traversable, contended, that this was a fact which was cognizable by the Court itself, being merely ancillary to the taxation of costs, which is its proper province, and that the decision of the Court was final. We are of opinion in favour of the plaintiff, upon the weight of authority as well as principle.

The *amount* of costs, it is true, is a matter wholly within the province of the Court to determine, in those cases where a party is entitled to them; but the *right* to costs is given by the statute law. Where the *amount* merely depends on a fact, which it is unnecessary to notice on the record, as, for instance, where a successful plaintiff or defendant is entitled to double costs, the Court may award them on the taxation; but where the right to *any* costs is in question, and depends upon a fact, the determination of which is not by the statute law vested in the Court, and which must be stated on the record to justify the award of costs, contrary to the usual course, the fact, if the opposite party insists upon it, ought to be tried by a jury.

By this statute, 23 Geo. 2, c. 33, the *defendant*, in an action

(a) 9 Rep. 25.

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40s., and there is no Judge's certificate, is entitled to double costs, if the fact be (not if it *appear to the Court to be*) that he resided, at the time of action brought, within the county, and was liable to be summoned to the county court, that is, in respect of the debt recovered. In this case, therefore, the right depends on a fact; the fact (or it would be error) must be assigned on the record as a reason for departing from the Statute of Gloucester, and must be determined, if disputed, as all other facts are, which are not cognizable by the Court itself. There are cases, however, in which a suggestion is not traversable. For instance, where a statute gives *the Court* cognizance of the fact, there its decision would not be traversable. There are several of such statutes. Thus, under 3 Jac. 1, c. 15, (the London Small Debts Act), the defendant is entitled to his costs, if it *shall appear to the Judge or Judges of the Court* where the action is tried, that the debt to be recovered does not amount to 40s., and the defendant shall duly prove by testimony on his own oath, to be allowed by the Judge or Judges of the Court, that he was inhabitant and resident within the city, or the liberties thereof, at the time of the action brought. Under this act, it belongs to the Court to determine the fact. The 22 Geo. 2, c. 47, (Southwark Act), contains a similar clause; other acts, as 47 Geo. 3, s. 1, cc. 85 and 45, (local and personal), make the defendant's right depend on the Judge's certificate, and the fact could not be afterwards disputed; and so, under 43 Geo. 3, c. 46, the fact of the defendant being arrested without reasonable cause for a greater sum than the plaintiff recovers, is to be determined by the Court. Another class of cases, where the matter of the suggestion belongs to the Court, is where the Court, having a discretionary power over its own process, is called upon to depart from the usual course, upon the suggestion of some matter which renders such departure expedient or essential for the purposes of justice, as where a venue is to be changed

because an impartial trial cannot be had, or where the sheriff is a party. In such a case, it is manifest that the suggestion cannot be traversed; for to whom is the writ to be directed for trial of the fact? Surely not to the sheriff of the county, to be tried by a jury of that county, *whether they are impartial*, or to be tried by a jury of his own selection, whether he be a party? These cases imply the necessity of a preliminary determination by the Court itself, to whom the process shall be directed. In the following cases, it is said that such a suggestion as the present is traversable. *Fitzpatrick v. Pickering* (a); *Harvey v. Ad-derley* (b), where time was given to demur or traverse; *Jefferies v. Watts* (c), per *Chambre, J.*; *Hickman v. Colley* (d), per *Lee, C. J.*; *Unwin v. King* (e), per *Patteson, J.*; *Ran-son v. Dundas* (f), per *Tindal, C. J.* It is to be observed, that the case in *Andrews*, 377, in which there is the dic-tum of Lord Chief Justice *Lee*, arose on the 3 Jac. 1, c. 15, on which statute it would seem that the Court itself was to determine, and it is doubtful whether the London Court of Request Act (39 & 40 Geo. 3), with reference to which *Chambre, J.*, was speaking, is not to be construed in the same way; but still these dicta are authorities for the ge-neral proposition, that matters of fact contained in a sug-gestion are traversable, where the Courts are not autho-rized to determine them. In the case of *Bartholomew v. Carter* (g), in which *Maule, J.*, is supposed to have inti-mated a different opinion, the authorities above cited were not brought to his notice; and to those may be added the case of *Hickman v. Colley*, in 2 Str. 1120, in which a *de-murrer* to a suggestion was argued and *determined*. The authorities above cited are sufficient to satisfy the Court; they are consistent with principle, and the traverse must be

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(a) Barnes, 470.

(b) Ibid. 471.

(c) 1 N. R. 157.

(d) Andr. 377.

(e) 2 Dowl. P. C. 594.

(f) 5 Dowl. P. C. 208.

(g) 1 Dowl. P. C. (N. S.) 212.

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allowed. If the defendant succeeds, he will be entitled to the costs of that traverse (2 Str. 1120). The plaintiff, in entering the suggestion himself, was irregular, but it will be of no advantage to the defendant to set it aside, in order that he may enter, and the plaintiff traverse it. Therefore the rule must be discharged, but without costs.

Rule discharged without costs.

June 15.

SLOANE v. PACKMAN, Clerk.

A declaration in covenant stated that the defendant had granted an annuity to the plaintiff, and for the better securing the said annuity demised a rectory and prebendal stall to certain trustees, and covenanted for payment of the annuity: and alleged as a breach the non-payment thereof. To this declaration the defendant, being under terms of pleading issuably, pleaded that the indenture was made with the view of charging, and was a charge upon, the rectory, the same being a benefice with a cure of souls, contrary to the stat. 13 Eliz. c. 20, and that the indenture and security were made to evade the statute.

E. JAMES had obtained a rule, calling upon the plaintiff to shew cause why the interlocutory judgment signed by him should not be set aside for irregularity. It appeared that judgment had been signed on the ground that the defendant, being under terms of pleading issuably, had pleaded pleas which were not issuable. The declaration was in covenant, and, after stating that the defendant had granted to the plaintiff an annuity of £194, to be paid to the plaintiff by four equal quarterly payments, it alleged that, for the better securing the said annuity, the defendant demised to certain persons, as trustees for the plaintiff, a certain rectory and prebendal stall. It then set forth a covenant by the defendant for the payment of the annuity, and alleged as a breach the non-payment of it.

To this declaration, the defendant pleaded that the indenture was made with the express view of charging, and was a charge upon, the said rectory, which was a benefice with cure of souls, within the stat. 13 Eliz. c. 20, and that the said indenture and security were made with intent to evade the provisions of that statute.

Held, that the plea was not an issuable one, as it stated no new fact upon which the plaintiff could go to the jury; and that the statute avoided the charge upon the benefice only, but not the covenant in the deed containing it.

Kelly (Cother with him) shewed cause.—It is clear that a covenant to pay an annuity is good, and such a covenant may be sued upon, although it is contained in a deed which charges a benefice contrary to the statute. [*Parke, B.*—The case of *Mouys v. Leake* (a) seems to be exactly in point. There it was held, that although the grant of a rent-charge by the rector was void by the statute, yet that if, in the deed, he also covenants personally to pay the rent-charge or annuity, and gives a warrant of attorney as a collateral security, the Court would not order the deeds to be delivered up to be cancelled.] *Kerrison v. Cole* (b) is also an authority to the same effect. It was there held, that though a bill of sale for transferring the property in a ship by way of mortgage might be void as such, for want of reciting the certificate of registry therein, as required by 26 Geo. 3, c. 60, yet the mortgagor might be sued on his personal covenant contained in it for repayment of the money lent. [He was then stopped by the Court.]

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E. James, contra.—The case of *Mouys v. Leake* is distinguishable, as that turned in part upon the validity of a warrant of attorney, and does not decide the question as to personal covenants. The case of *Saltmarshe v. Hewitt* (c) is in point. There the defendant, a beneficed clergyman, gave the plaintiff a warrant of attorney to enter up judgment against him for £3600. The defeasance recited, that the plaintiff had agreed to purchase an annuity of the defendant for £1800, and that the annuity was or was intended to be secured to the plaintiff by indenture of even date with the warrant of attorney, charging the annuity on his benefice; and that the parties had also agreed that the annuity should be secured by warrant of attorney as above, which had been executed. The defeasance further declared, that the judgment on the warrant

(a) 8 T. R. 411.

(b) 8 East, 231.

(c) 1 Ad. & Ell. 812; 3 Nev. & M. 665.

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of attorney was to be a collateral security only, and that execution was not to issue till payment should have been twenty-one days in arrear; in which case, and so often as it should so happen, the plaintiff might immediately obtain sequestration of the rectory, to the intent that he should recover the arrears. The Court set aside the warrant of attorney, as charging the benefice contrary to the statute. It never has been decided that where a deed is rendered void by statute, an action can be maintained on a covenant contained in it. [*Rolfe, B.*—You assume that the deed is rendered void, but it is not so. It only makes the charge on the benefice void.] It is submitted that this is a substantial defence in point of law.

LORD ABINGER, C. B.—The plea is not an issuable one, for no issue can be taken upon it. The defendant might, if he pleased, have set out the deed on oyer, and demurred.

PARKE, B.—It is clear that this is not an issuable plea, for it states no new fact upon which the plaintiff could go to the jury. It only depends on the deed; and if the defendant meant to contend that it was void, he might have demurred. The case is governed by *Mouys v. Leake* (a), which Lord *Ellenborough*, in *Kerrison v. Cole* (b), treats as decisive, and says “is founded on admirable good sense, and sound law.” The covenant to pay the money is not invalid. It does not charge the benefice contrary to the provisions of the statute; and the statute avoids the charge only, but not the deed that contains it.

ROLFE, B., concurred.

Rule discharged.

(a) 8 T. R. 411.

(b) 8 East, 231.

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BRAIN, Executor, &c., v. PREECE.

June 14.

DEBT for goods sold and delivered, and on an account stated. Pleas, non assumpsit, the Statute of Limitations, and payment; and issues thereon.

This was an action brought to recover the sum of 4*l.* 15*s.* for coals alleged to have been sold by the plaintiff's testator to the defendant. At the trial, before the under-sheriff of Hereford, it appeared that it was the duty of a person of the name of Harvey, who worked at the coal-pit, to give notice to Yem, the foreman, of the coal which was sold. Yem was not present when the coal was delivered, and, not being able to write, employed a person of the name of Baldwin to make entries in the books from what he, Yem, told him. Both Harvey and Yem were dead; but in order to prove the delivery of the coals, Baldwin was called as a witness, who produced the book, and stated that he made it out from Yem's directions, and that every evening he read over the entries to him. It also appeared to have been the course of business for the customers to go to the pit's mouth, and take the coal away with them. There was evidence that the coal in question had been delivered to the defendant, but it did not appear to have been credited in the plaintiff's books, whence the plaintiff concluded it had not been paid for. The defendants called a number of witnesses, who proved that they had seen the coal fetched away, and paid for by the defendant, in various instances. In reply, the plaintiff proposed to recall certain witnesses who had been previously examined. The under-sheriff rejected the entries in the book, and refused to allow the witnesses to be recalled, and the defendants had a verdict on all the issues. A rule nisi having been obtained to set aside the verdict, and for a new trial,

Where it was the course of business for H., one of the workmen at a coal mine, to give notice to Y., the foreman, of the coal sold, and Y., not being able to write, employed one B. to make entries of the sales in a book at the time from his, Y.'s, information:—*Held*, that, H. and Y. being dead, the entries were not evidence in an action for the price of such coals.

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J. W. Smith now shewed cause.—The plea of payment having given full notice to the plaintiff of what the defendant's evidence would be, he should have launched the whole of his case in the first instance. [Lord *Abinger*, C. B.—How could he launch a case of contradiction, when he did not know what it would be?] As to the other point, the ruling of the under-sheriff was right. In *Price v. Lord Torrington* (a), the entry was by the deceased drayman's own hand. There is no case in which an entry, not by the deceased servant or agent himself, but by another party from his information, has been admitted, and it will be for the Court to say whether they will push the rule so far. But even if this rule were made absolute, the result must be the same, because the books applied to two items only, both of which were barred by the Statute of Limitations. [Lord *Abinger*, C. B.—There is no ground for a new trial on this point.]

Gray, in support of the rule.—The main question is, whether this book was admissible in evidence. The only difference between this case and that of *Price v. Lord Torrington* is, that here the party, whose duty it was to make the entry, was dead, and the party who made it was near enough to see the carts, though not near enough to see in whose carts the coals went away. The entry, therefore, is admissible as an entry made at the time, and in the usual course of business, and is in effect an entry made by Yem. *Poole v. Dicas* (b) shews that the mere fact of the entry not being in the party's own hand makes no difference. And in *Doe d. Patteshall v. Turford* (c), *Parke*, J., says, that "in the case of an entry falling under the first head of the rule, as being an admission against interest, proof of the handwriting of the party, and his death, is enough to authorize

(a) Salk. 285.

(b) 1 Bing. N. C. 649 ; 1 Scott, 600.

(c) 3 B. & Ad. 898.

its reception ; at whatever time it was made it was admissible ; but in the other case it is essential to prove that it was made at the time it purports to bear date ; it must be a contemporaneous entry." This is a contemporaneous entry, made in the due course of business, and whether made by the deceased's own hand or that of any one else at the time, can make no difference. Here, too, the party whose duty it was to make the entries *could not* write.

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LORD ABINGER, C. B.—I am of opinion that this rule must be discharged, and that the book produced was not admissible in evidence. With respect to the case of *Price v. Lord Torrington*, often as it has been cited, I am not aware of its universal application, and I have known judges say they would not carry the doctrine of that case any further. The case of the attorney, in *Doe v. Turford*, stands on precisely the same grounds as that of *Price v. Lord Torrington*. There it was proved that the notices were written, and that the attorney had gone out, and indorsed the duplicate when he came back, and that it was his practice so to indorse it when he had served the original ; and that was rightly held to be proof of the service of the notice. There is also another case, viz., that of the notary (*a*), where similar entries were held evidence ; but a notary is a public officer, and is sworn to do his duty as a notary, and in foreign countries the acts of a notary are like the acts of a court, although that is not so here. The way to prove the noting is to prove the protest, and although the notary is very often called to prove his protest, I am not aware that it is necessary ; for, supposing the clerk were dead, still I think the protest would be sufficient evidence. It is like any other case of a public officer who does anything in the course of business. But the case where the books are not written by the party him-

(a) *Poole v. Dicus*, *supra*.

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self, but at his supposed dictation by another man who is dead, is widely different. As regards the case of *Price v. Lord Torrington*, it is better to adhere to that case as it stands, and not to give any extension to it. The rule must be discharged.

GURNEY, B., and ROLFE, B., concurred.

Rule discharged.

June 14.

REGINA v. CHAMBERS and Others.

A bond given to the Crown by the committee of a lunatic, on his appointment, is within the stat. 33 Hen. 8, c. 39, s. 50, and the Crown is entitled to treat it as matter of record, and have a scire facias thereon.

THIS was a scire facias issued against the defendants, for the breach of the condition of a bond given by them to the Crown on the appointment of the defendant Chambers as committee of the estate of a lunatic, for the due discharge of his duties and passing of his accounts, he having become bankrupt.

Manning, Serjt., now moved, on the part of the assignees under his bankruptcy, for a rule to shew cause why the scire facias, and the judgment thereon, should not be set aside, contending that such a bond was not within the stat. 33 Hen. 8, c. 39, s. 50 (a), so as to entitle the Crown to treat it as matter of record, and have a scire facias thereon.—This point was raised, but not decided, in *Rex*

(a) Which enacts, that “all obligations and specialties, which, after the first of May next coming, shall be made for any cause or causes touching or in anywise concerning the King’s most royal majesty, or his heirs, or to his or their use, commodity, or behoof, shall be of the same nature, kind, quality,

force, and effect, to all intents and purposes, as the writings obligatory taken and acknowledged according to the statute of the staple at Westminster have at any time before the making of this present act been taken, used, exercised, and executed against any lay person or persons.”

v. Lambe (a). A similar question arose also before Lord *Manners*, in *Ex parte Usher* (b). There a person, who had been appointed guardian to a minor, and had entered into the usual recognizances with two sureties to account for his property, became bankrupt; and in support of a petition presented on behalf of the sureties, praying that certain mortgaged premises belonging to the bankrupt might be sold, and the surplus, after satisfying the mortgage, applied in discharge of the debt secured by the recognizance, it was urged that this was a debt upon record due to the Crown, which therefore overreached the bankruptcy. But the Lord Chancellor said, "It certainly does not appear to me to be a debt due to the Crown, nor such as to warrant a Baron of the Exchequer to grant a fiat for the purpose of an extent issuing; for it is not a *public debt*, in which case alone the Crown process issues: and I think that the form of the security does not alter the nature of the debt in this respect." [Lord *Abinger*, C. B.—Are you aware of any difference between debts due to the Crown because the Crown represents the public interests, and debts due to the Crown by virtue of its prerogative? The only question has been, whether the prerogative, which is the foundation of all these rights, should be applied to debts due by virtue of acts of Parliament made for the benefit of the public. But there is no difference in the process.] This seems to be a third case, in which neither the Crown is personally interested, nor the public interests involved.

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LORD ABINGER, C. B.—This is a case in which the Crown, by virtue of its office, is entitled to the custody of the lunatic, and may therefore take such securities as it thinks fit for the protection of his estate. The Crown exercises this custody by virtue of its prerogative, and did

(a) Mann. Exch. Pr. (Revenue Branch), 150.

(b) Ball & Beatty, 197.

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so from the earliest feudal times. This is, therefore, a bond taken to the use of the Crown, and within the provisions of the statute of Hen. 8.

The other Barons concurred.

Rule refused.

June 14.

DAVIDSON, Public Officer, &c., v. COOPER and
BRASSINGTON.

Where a banking co-partnership, established under 7 Geo. 4, c. 46, s. 9, had once begun to carry on the trade and business of bankers, and issued notes accordingly, but subsequently stopped payment, and merely kept the establishment open for the purpose of paying their notes and winding up the affairs of the concern:—

Held, that they still continued to be a banking co-partnership, within the meaning of the 7 Geo. 4, c. 46, so as to be entitled to sue by their public officer.

Assumpsit on a guarantee, described in the declaration as “a guarantee or agreement in writing:” plea, non assumpsit:—*Held*, that it was not a defence under the plea of non assumpsit, that subsequently to the execution of the agreement, and whilst it was in the possession of the plaintiff, a seal was affixed to the defendant’s signature, so as to make the instrument purport to be a deed, but that such defence ought to be pleaded specially.

Assumpsit on a guarantee. Plea, that after the guarantee or agreement in writing had been made and signed, and after the defendants had promised as in the declaration mentioned, and after the guarantee had been delivered to the plaintiff, and whilst it was in his hands, it was, without the knowledge or consent of the defendant, altered in a material particular by some person to the defendant unknown, and its nature and effect materially changed, by such unknown person affixing a seal by or near to the signature of the defendant, so as to make it purport to be sealed by the defendant, and to be the deed of the defendant; by reason of which alteration the said guarantee became void in law. At the trial, it was proved that the guarantee when signed had no seal to it, but, when produced in evidence by the plaintiff, it had a wafer affixed to it before the signature of the defendant:—*Held*, first, that the plea was proved, and that it purported to be the deed of the defendant: secondly, on a motion for judgment non obstante veredicto, that the plea was a good defence to the action.

banking co-partnership as a fluctuating body, the defendants agreed to guarantee the said banking co-partnership from loss by reason of any sums of money then due, or thereafter to become due, from the said J. Mayer & Co. And thereupon, by a certain guarantee in writing then made and signed by the defendants, it was witnessed that, in consideration of the premises, the defendants, at the request of and for the purpose of assisting the said S. Mayer & Co., did thereby agree with the said banking co-partnership, as a fluctuating body, that they, the defendants, would guarantee the said banking co-partnership for the due payment of all and every sum and sums of money which then was and were or from time to time thereafter should become due from the said S. Mayer & Co., their executors, &c., for or by reason of any monies, bank notes, bank post bills, bills of exchange, promissory notes, or other instalments then advanced, or owing, or discounted or negotiated, or thereafter to be advanced, &c., on the said banking account, or which the said banking co-partnership then were or thereafter might become liable to pay for or on account of the said S. Mayer & Co., with interest, commission, and all other banking charges and allowances for or in respect of all such monies and advances respectively, &c. &c., limiting the amount to £1500; the guarantee to be a continuing guarantee until the defendants should give three months' notice in writing of their intention to withdraw and determine the same. It then averred, that advances were made to Mayer & Co. exceeding the amount of the guarantee; that they, although requested, wholly failed to repay the same, of which the defendants had notice, and were requested to pay the said sum of £1500, but wholly neglected and refused so to do.

To this declaration, the defendant Brassington pleaded non assumpsit. The defendant Cooper also pleaded, first, non assumpsit; secondly, that at the time of the commencement of the suit, there were not, nor are there, per-

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sons united in co-partnership or carrying on the trade or business of bankers in Manchester, or elsewhere in England, under the name or style of the Commercial Bank of England, by virtue of or according to the provisions of the said act of Parliament in the declaration mentioned, in manner and form as in the declaration alleged. He also pleaded, sixthly, that, after the said guarantee or agreement in writing in the said declaration mentioned had been made and signed by the defendants, as in the said declaration mentioned, and after the defendants, in consideration of the premises in the said declaration mentioned, had promised as in the said declaration mentioned, and after the same guarantee or agreement in writing had been delivered to the said banking co-partnership, and before the commencement of this suit, and whilst the said guarantee or agreement in writing was such continuing guarantee as in the said declaration mentioned, and was in the possession of and held by the said banking co-partnership for the purposes in the said declaration mentioned, to wit, on &c., the said guarantee or agreement in writing in the said declaration mentioned was, without the knowledge or consent of the said defendant William Cooper, by some person or persons to the defendant William Cooper then and now unknown, altered in a material particular, and its nature and effect materially changed, by such unknown person or persons putting and affixing, and causing and procuring to be put and affixed, to the same agreement or guarantee in writing, two certain seals by and near to the respective signatures of the said defendants to the same agreement or guarantee in writing, and as and for the respective seals of the said defendants to the said guarantee or agreement in writing, that is to say, one of such seals by or near to the said signature of the said defendant William Cooper, to the said agreement or guarantee in writing, as being and purporting to be the seal of him the said defendant William Cooper to the same instrument,

and one other of such seals by and near to the said signature of the said defendant Henry Brassington to the said guarantee or agreement in writing, as being and purporting to be the seal of him the said defendant Henry Brassington to the same instrument, and thereby, and without the consent of the said defendant William Cooper, wrongfully causing the said guarantee or agreement in writing, after the said defendants had written their names thereto as aforesaid, to purport to have been respectively sealed by each of the said defendants, and to be the deed of each of them the said defendants; and the said defendant William Cooper saith, that the said guarantee or agreement in writing, upon which such respective seals had been so wrongly put to and affixed as aforesaid is in fact the same guarantee or agreement in writing in the said declaration mentioned; and so the said defendant William Cooper says, that, by reason of the premises in this plea mentioned, the said guarantee or agreement in writing in the said declaration mentioned, from the time of the said alteration, and the putting and affixing the said seals thereto in manner aforesaid, and before the commencement of this suit, was and is void in law and of none effect. Verification.

Replication to the sixth plea, that the said guarantee or agreement in writing in the said declaration mentioned was not altered in manner and form as in the said sixth plea of the said William Cooper alleged.

At the trial, before *Rolfe*, B., at the Spring Assizes at Liverpool, 1842, it appeared that the guarantee was signed by the defendants on the 17th of May, 1839, and that at the time it was so signed there were no wafers or seals opposite the signatures of the defendants; but when produced at the trial, wafers had been affixed to it before the names of each of the defendants. It was proved that the Commercial Bank of England stopped payment in June, 1840, and from that time it ceased to carry on business as a bank of issue, and that in the returns made to

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the Stamp-office in 1841 and 1842, in pursuance of 7 Geo. 4, c. 46, it was stated that the bank had "ceased to issue notes." But it appeared that the establishment of the Commercial Bank was still kept open, for the purpose of winding up its affairs; that there were notes outstanding; and that if notes were brought they were paid in gold, and that persons were in the receipt of payment for their notes from time to time, but no new accounts were opened. The action was commenced in December 1841. It was objected, for the defendants, that there was no evidence of the bank carrying on business as a bank at the time of the commencement of the action, in support of the issue raised by the second plea. This objection was overruled by the learned Judge, who directed the jury to find a verdict for the plaintiff for the amount of the guarantee, leave being reserved to the defendants to move to enter a verdict for them on the above points.

Dundas, in Easter Term, moved accordingly, on two grounds: first, that the banking company in question were not carrying on business as such at the commencement of the action, within the meaning of the 7 Geo. 4, c. 46, s. 9, and consequently were not entitled to sue in the name of their public officer: secondly, that the affixing of the wafers or seals to the guarantee after its execution, and whilst it was in the possession of the plaintiff, vitiated it altogether. First, the banking company having stopped payment in June 1840, and ceased to issue notes, were not carrying on business as a banking company within the meaning of the act at the time of the commencement of the action. The 7 Geo. 4, c. 46, s. 9, provides, that all actions against any person or persons indebted to any such co-partnership *carrying on business* under the provisions of that act, for recovering any debts due to such co-partnership, shall and lawfully may be commenced and prosecuted in the name of any one of the public officers for the time being of such

co-partnership. But this company were not carrying on business at the time, having ceased to do so, and were merely winding up their affairs. The mere fact of the banking establishment being kept open for the purpose of winding up the concern is not sufficient to bring them within the act: they must be actually carrying on business. That was held in *Fletcher v. Crosbie (a)*, where a declaration describing the plaintiff as "one of the present public officers of certain persons united in copartnership for the purpose of carrying on the trade and business of banking in England, according to the stat. 7 Geo. 4, c. 46," was held bad, for that it ought to have stated that the co-partnership were carrying on business. [*Parke, B.*—What is to be done when they stop payment, but have not collected in their debts?] The act has not said what is to be done in such a case; but unless they bring themselves within its provisions, they cannot derive advantage from it.—He referred to the judgment of *Tindal, C. J.*, in *The Bank of England v. Anderson (b)*. The question raised by the plea is, whether, at the commencement of the suit, the banking company were or are carrying on business as bankers according to the provisions of the act; and it is submitted they were not.

PARKE, B.—Where the co-partnership have never begun to carry on business as bankers, they do not come within the provisions of the act; but when once they have begun business, and once come within the act, I think they continue so until all the debts are paid which were contracted in that character.

The rest of the Court concurred, and as to this point the rule was refused.

(a) 9 M. & W. 252.

(b) 3 Bing. N. C. 589.

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On the other point, rules were granted on behalf of each of the defendants, and they now came on together.

Erle, Knowles, and Crompton shewed cause (May 28, 1842).—The affixing of the wafers to the guarantee did not vitiate it.—It does not purport to be a deed, nor is it treated as such, and there is no alteration in the language or the sense of it. In order to succeed in this objection, the defendants must shew that the alteration has the effect of making it a deed; but in order to make it a deed, a delivery of it would be necessary. *Shep. Touch.* 55. The issue on the 6th plea of the defendant Cooper is, whether it is altered in a material part, so as to make it a deed. Now there is no alteration in the words of it. [*Alderson, B.*—Yes; the placing seals upon it, and making it a deed, alters the meaning of the words. The words do not mean the same thing. *Parke, B.*—There cannot be a greater alteration than turning an agreement into a deed. *Lord Abinger, C. B.*—If it is a deed, it would be valid without any consideration. It has been held that signing and sealing are *primâ facie* evidence of the delivery.] The language of the instrument is that of an agreement only. [*Rolfe, B.*—A deed is an agreement under seal.]

Secondly, the rule obtained by the defendant *Brassington* must, at all events, be discharged, for the fact of the alteration cannot be given in evidence under non assumpsit, but must be specially pleaded. The plea of non assumpsit asserts that there never was any binding contract between the parties, whereas the evidence shews that before the seals were affixed to the guarantee, it was a valid instrument, capable of being enforced. In *Hemming v. Trenery (a)*, which was assumpsit on a guarantee, to which

(a) 9 Ad. & Ell. 926; 1 P. & D. 661.

the only plea was non assumpsit, it appeared at the trial that the instrument had been interlined so as materially to alter its effect, and the jury found that the interlineation was made after the instrument was executed: and it was held that the effect of the alteration being only to discharge or modify the original contract, it was a defence which required to be shewn by way of confession and avoidance, and could not be given in evidence under the general issue. The rule of H. T., 4 Will. 4, is express, that "in every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; and the decision in *Hemming v. Trenery* is in accordance with that rule. If there has once been an express promise, and there has been any alteration in it, or anything done to avoid it, it ought to be pleaded. It may be said, that, because it is altered, and so vitiated, it cannot be produced in evidence; but there are authorities that although the seals to a deed be destroyed, or broken by accident before the trial, it is still good evidence on the trial. *Nichols v. Haywood* (a), *Michael v. Scockwith* (b). The question under that plea is, whether there was at any time such a binding contract as the one declared on.

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Dundas, W. H. Watson, Warren, and Hugh Hill, contra.—First, it is clear that the sixth plea of the defendant Cooper was proved by the evidence, and therefore the verdict ought to be entered for him. Then, secondly, this is a defence which was available under the plea of non assumpsit. In *Calvert v. Baker* (c), which was an action by the indorsee against the acceptor of a bill of exchange, it was held to be a good defence under a plea "that the defendant did not accept the bill declared on;" that after he had accepted it

(a) *Dyer*, 59 a. (b) *Owen*, 8; *Cro. Eliz.* 120. (c) 4 *M. & W.* 407.

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generally, it was altered without his knowledge, by the addition of a memorandum making it payable at a banker's. That is an authority in point. [Parke, B.—The reason there given seems to be, that the bill produced is so altered as to become a different instrument, and, therefore, the plea was proved. Was that case cited in *Hemming v. Trenergy*?] It was not; but it is submitted that the correct rule is laid down in *Calvert v. Baker*; and *Cock v. Coxwell* (a) is an authority to the same effect. This would clearly have been an objection on non assumpsit, before the New Rules; and the rule is, that “all matters in confession and avoidance” shall be specially pleaded; but this, if pleaded, would not be in confession and avoidance; it would not confess the contract and a breach of it. The case is one rather of evidence than of pleading, and the question is, whether this is a document which cannot be read in evidence because it has been altered. The objection is, that the instrument varies in a material particular from that stated in the declaration; and it must be given in evidence by the plaintiff in support of it.

PARKE, B.—It seems to me that the special plea of the defendant Cooper is proved, and that he is entitled to have a verdict entered for him upon that plea. The allegation in it is, that the guarantie, after its execution, was altered in a material particular, and its nature and effect materially changed; and there can be no doubt that the alteration was in a material particular, and that its nature was materially changed. The plea then states, that the seals were affixed to the instrument near to the signatures, and as and for the seals of the defendants and purporting to be their seals; I think that allegation is proved. Whether the seals be placed before or after the names of the parties, they still purport to be the seals of the parties. There are two seals, and as both the defendants contract, and both execute, no

(a) 2 C., M. & R. 291.

one could doubt that any jury would say it was their deed. The next question arises under a rule obtained by the defendant Brassington, whether this defence is admissible under the plea of non assumpsit, and I think it is not. All the authorities were considered in *Hemming v. Trenergy* (a), where there was an elaborate argument, and apparently a written judgment; and the decision of the Court in that case appears to me to be correct. The proper plea in the present case would have been by way of confession and avoidance. The plea need not have been confessed the breach, as Mr. *Watson* says; but the defendant's answer would have been, that, since the making of the contract, its effect had been altered by its being converted into a contract under seal. But it is said that this view of the case is at variance with the decision of this Court in *Calvert v. Baker*. All, however, that the Court must be considered as having decided in that case is, that the alteration in an instrument may be objected to on non assumpsit, when its effect is to make it a different instrument, so as to render a new stamp necessary; for if Mr. *Richards's* argument in that case is looked at, it will be found to turn upon the necessity of a fresh stamp by reason of the alteration, and the judgment of the Court must be taken to be with reference to that argument, and on that ground, I think, may be supported. The result is, that a verdict will be entered for the defendant Cooper on the special plea, and for the plaintiff on the plea of non assumpsit by Brassington. The first rule will, therefore, be made absolute, and the second discharged altogether.

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LORD ABINGER, C. B., ALDERSON, B., and ROLFE, B.,
concurring,

Rules accordingly (b).

(a) 9 Ad. & Ell. 926; 1 P. & D. 661.

(b) See *Mason v. Bradley*, ante, 590.

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Knowles then moved to arrest the judgment, or to enter judgment for the plaintiff non obstante veredicto, on the ground that it was not stated in the plea that the alteration was made by the plaintiff, or with his privity. The Court having granted a rule,

Kelly and Watson, in Michaelmas Term, 1842, (November 11), shewed cause.—The question is, whether the plea of the defendant Cooper is a good answer to the action, and it is submitted that it is. It states in substance, that after the guarantie had been made and delivered to the banking co-partnership, and whilst it was in their possession, it was, without the knowledge or consent of him, the defendant Cooper, by some person to him unknown, altered in a material particular, and its nature and effect materially changed, by such unknown person affixing and causing to be affixed to it two seals by and near to the respective signatures of the defendants, and thereby causing the guarantie to purport to have been sealed by the defendants, and to be the deed of the defendants. No doubt this was a material alteration, and changed the nature and effect of the instrument, giving to the plaintiffs the advantage of being specialty creditors, and of suing in covenant instead of assumpsit; and this Court has accordingly held the alteration to be material, and ordered a verdict to be entered for the defendant Cooper on that ground. But the question now is, whether, if a written agreement be altered in a material part, without the party's knowledge, whilst it is in his possession, it avoids it, so as to make an action upon it not maintainable. There can be no doubt that, if a deed be altered without the consent of the parties to it, it avoids it: and the same rule is applicable in the case of any instrument in writing. In *Pigot's case* (a), where the ques-

(a) 11 Rep. 27 a.

tion was as to a deed, it was resolved "that when any deed is altered in a point material by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, rasing, or by the drawing of a pen through a line, or through the midst of any material word, the deed thereby becomes void." Several instances are there given of alterations which are material; but the principle is, that where such an alteration is without the privity of the party to be affected by it, it avoids the deed. Where the alteration is made by the plaintiff himself, it avoids the deed, though it be not material; but if a stranger, without his privity, alters the deed in any point which is *not* material, it does not avoid it. Shep. Touch., 68, is an authority to the same effect. That principle applies equally to the case of an alteration in a guarantie, or any other species of writing. In *Master v. Miller* (a), it was held to apply to bills of exchange. There an alteration of the date of a bill of exchange, after acceptance, whereby the payment would be accelerated, was held to avoid the instrument, so that no action could be afterwards brought upon it, even by an innocent holder for a valuable consideration. Lord *Kenyon*, C. J., there says, "The cases cited, which were all of deeds, were decisions which applied to and embraced the simplicity of all the transactions of that time; for at that time almost all written engagements were by deed only. Therefore, those decisions, which were, indeed, confined to deeds, applied to the then state of affairs; but they establish this principle, that *all written instruments* which were altered or erased should be thereby avoided." And *Ashhurst*, J., says, "It seems admitted that, if this had been a deed, the alteration would have vitiated it. Now, I cannot see any reason why the principle on which a deed would have been avoided should not extend to the case of a bill of exchange. All written contracts, whether by deed

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or not, are intended to be standing evidence against the parties entering into them. There is no magic in parchment or in wax; and a bill of exchange, though not a deed, is evidence of a contract as much as a deed; and the principle to be extracted from the cases cited is, that any alteration avoids the contract." The same principle was established in that case, on the argument of the writ of error in the Exchequer Chamber, and the judgment was affirmed (a). The case of *Master v. Miller* was followed by that of *Powell v. Divett* (b), which was an action on a bought and sold note, and it was there held that a material alteration in a sale note, made by the broker, after the bargain, at the instance of the seller, without the consent of the purchaser, annuls the instrument, so as to preclude the seller from recovering upon the contract evidenced by the instrument so altered by him. That was not the case of a deed or a bill of exchange, but of a mere mercantile contract. It is true it was equivalent to the act of the plaintiff himself; but it shews that the principle of *Pigot's case* is applicable to other instruments besides deeds. In the recent case of *The Earl of Falmouth v. Roberts* (c), which was an action for the breach of certain stipulations in an agreement by a landlord against his tenant, *Parke, B.*, said, "It is laid down by Lord Coke, that a deed is rendered invalid by an alteration in a material part of it—*Pigot's case*; and I do not see why the same rule should apply to agreements. That rule, however, operates only where the obligation is by reason of the instrument itself, and therefore does not apply to this case." In *Sanderson v. Symonds* (d), which was an action on a policy of insurance, the alteration was held to be immaterial, and therefore not to avoid the policy; but the Court appeared to be all of opinion that this doctrine applied to policies of insurance.

(a) 2 H. Bl. 140.

(b) 15 East, 29.

(c) 11 Law J. Rep. Exch. 180 ;

9 M. & W. 469.

(d) 1 Brod. & B. 426.

And in *French v. Patton* (a), which was also an action on a policy of insurance, it was held that the plaintiff could not recover upon the policy, by reason of the alteration in it. There are other cases to the same effect; but being mixed up with questions on the stamp laws, it is not thought desirable to encumber the Court with them. The only case which raises any distinction is the case of an award; and in *Henfree v. Bromley* (b), where, after the award was made, an alteration was made by the umpire of the sum awarded, it was held to be void, though made on the same day, and before the delivery of the award, but that the award was good for the original sum awarded, which was still legible, the same as if such alteration had been made by a mere stranger, without the privity or consent of the party interested. But the doctrine of alterations in awards does not apply here. In cases like the present, it is where the instrument is altered as between the one party and the other, and advantage may be sought to be derived from the alteration; but in the case of an award, as soon as the arbitrator has published his award, he is functus officio, and the distinction is, therefore, obvious. The principle to be deduced from the cases is, that whether the alteration be made by the plaintiff or by a stranger, if it be a material one, it vitiates the instrument, and renders it wholly void. *Markham v. Gonaston* (c) is an express decision that an alteration by a stranger avoids the deed; and the case is an important one, because it was an action on the case against a stranger for making certain alterations, whereby the deed became void; and it was held that the plaintiff was entitled to recover. That shews there is a remedy by action on the case against the stranger for making the alteration by which the deed becomes void. There is no hardship in the case, for it is the duty of the party who has the instrument in his possession, and is charged with the safe custody of it, to take care of it,

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(a) 9 East, 351. (b) 6 East, 309. (c) Cro. Eliz. 626.

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and if it is altered whilst in his custody, it is but reasonable that he should incur the loss. The mischief produced by such an alteration as the present would be infinite, supposing the subscribing witness to be dead, and no one capable of explaining it. The instrument, at the time it was executed, was an instrument not under seal, but, by the alteration, it became a deed, and so would have bound the heirs. So also, it would avoid any plea of the Statute of Limitations. The important inquiry in these cases is, not by whom the alteration is made, but whether it be material, and when it was made. In *Desbrowe v. Wetherby* (a), where a general acceptance was altered by adding a place of payment, it was held that it discharged the acceptor, if made without his privity. There *Tindal*, C. J., asked the jury "whether they were satisfied that the addition of the place where the bill was payable was made *after it was accepted* by the defendant? if it was, there was nothing to shew that the defendant authorized the alteration, and, therefore, the alteration, *being a material one*, vitiated the acceptance: it materially altered the situation of the parties," &c., observing on the nature of the materiality. If the case depended upon the fact by whom the alteration was made, the learned Judge ought there to have inquired by whom it was made; but he does not. The same point was ruled by Lord *Lyndhurst*, C. B., in *Taylor v. Moseley* (b). *Downes v. Richardson* (c) is another instance where the same doctrine was carried out in a case of simple contract. The same law, therefore, is applicable to instruments not under seal as to those which are. The party in whose possession the instrument was at the time is responsible; and if an alteration be made in it, so as it become void, his remedy is against the stranger who made it, by an action on the case. The danger would be endless if it were otherwise. The case is analogous in

(a) 1 M. & Rob. 438.

(b) 1 M. & Rob. 439, n.

(c) 5 B. & Ald. 674.

this respect to that of a carrier, who, by the policy of the law, is made liable for loss or injury by robbery, fire, &c., and it is perfectly immaterial by whom it is occasioned. As long as the thing is in his custody, he is responsible for it. [Lord *Abinger*, C. B.—Suppose the distinction to be, that an alteration by a stranger does not vitiate an instrument, another question is, whether the fact of the alteration having been made by a stranger ought not to be replied.] Certainly. The defendant can only be bound to plead what he knows. Suppose it had been the accidental burning of the seal to a deed, surely the plaintiff ought to reply and shew it. It is for the plaintiff to give the explanation, as he, having the custody of the instrument, can alone have the means of shewing how the fact happened. The doctrine, as to the effect of an alteration in the case of deeds, has been settled by a long string of authorities, and the same law is applicable to other instruments.—They cited also *Seaton v. Hewson* (a), to shew that it is sufficient if the alteration be shewn to have been made before issue joined.

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Erle, Knowles, and Crompton, in support of the rule.—It will not be disputed that the law laid down in *Pigot's case* (b) was at that time the strict law; but it has been relaxed in modern times, and in the present day would be considered as an administration of blind justice; for it is not reasonable that because a third party, a stranger, has made an alteration in a written instrument, it should therefore be void as between the parties. And in *Sheph. Touch.* 68, the case is treated by Mr. Preston as overruled in this respect. He says, "At this day, alteration by a mere stranger would not vitiate the deed, if the contents of the deed could be proved. The case of *Texira v. Evans* (c) seems to have overruled this branch of the distinction." [Parke, B.—But that case was, in fact, overruled by this

(a) 2 Show. 28, 29. (b) 11 Rep. 27 a. (c) Cited 1 Austr. 228.

Exch. of Pleas, Court in *Hibblewhite v. M'Morine* (a).] In *Hudson v. Revett* (b), where the defendant executed a deed conveying his property to trustees for the benefit of creditors, the particulars of whose demand was stated in the deed ; and a blank was left for one of the principal debts, which, on being ascertained, was inserted in the blank the next day, in the defendant's presence, and with his assent ; it was held that the deed was valid, notwithstanding the filling up of the blank after execution. Now, according to the old decisions, that would have been void ; but the Court held otherwise. *Pigot's case* has been overruled in the Irish Courts, in *Swiney v. Barry* (c). Besides, there is this distinction between deeds and other written instruments, that in the case of deeds they are the cause of action itself. And in olden times, if the seals were eaten or torn off, the deed was void ; but in *Lady Argoll v. Cheney* (d), where the seals were torn off by a little boy, as was proved, after they had been once annexed, the deed was held nevertheless to be a good deed to lead the uses of a recovery. [*Parke*, B. —That was a case where the estate passed, not by the deed, but by the recovery. There is a distinction between cases where the estate passes by virtue of the instrument, and that of a deed where a lien is created by virtue of the deed. Suppose the case where an alteration is made in a covenant in a deed conveying an estate, the estate would pass, though you could not maintain an action on the covenant.] Deeds are distinguishable from cases like the present ; they stand on a technical ground, with reference to the issue on the plea of non est factum, and the rule respecting them does not apply to other written instruments. In *Master v. Miller*, Buller, J., says (e), " The difficulty which arose in the old cases depended very much on the technical forms of pleading applicable to deeds alone." This is not an action on the instrument itself only, as in the case of a

(a) 6 M. & W. 200.

(d) Palmer, 402.

(b) 5 Bing. 368 ; 2 M. & P. 663.

(e) 4 T. R. 339.

(c) Jones's Rep. 109.

deed, but on the facts alleged in the declaration, which states that Mayer & Co. had occasion for advances; that, for the purpose of inducing the banking company to render such accommodation, the defendants had agreed to guarantee them from loss, and thereupon they entered into this agreement in writing; and that advances were afterwards made: then the defendant says that he was liable, but that the agreement was entered into in writing, and an alteration has since been made in it, whereby he is no longer liable. There are many facts that came before the written instrument which would require to be proved, and the case does not depend upon that alone; but the Court are called upon to say, that, because one part of the evidence is altered, the cause of action is gone altogether. The case of *Master v. Miller* proceeded on grounds applicable to deeds, which are very distinguishable from this case: it was the case of the alteration of a bill of exchange before it fell due, and may be supported on the ground that that was not the bill the defendant accepted. *Buller, J.*, however, differed from the other Judges, and delivered a very clear judgment, which is in many parts of it applicable to this case. He there says, (p. 338), "It has been contended that there is an analogy between bills of exchange and deeds, and that in the case of deeds, erasure or alteration will avoid the deed. In answer to this, first, I deny the analogy between bills of exchange and deeds; and there is no authority to support it. In the case of deeds there must be a profert; and as we learn from 10 Co. 92, b., in ancient times the Judges pronounced upon view of the deed; though Lord *Coke* says that practice was afterwards altered. But there never was a profert of a bill of exchange: the Judges cannot determine on a view of that; but it must be left to a jury to decide upon the whole of the evidence according to the truth of the case." *Powell v. Divett* (a) was the common case where the party cannot be allowed to take advantage of his own

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(a) 15 East, 29.

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fraud, and of course the instrument, as affecting the party to the alteration, would be void. The observation of Parke, B., in the *Earl of Falmouth v. Roberts* (a), is rather in favour of the plaintiff, for he says that the rule as to alteration "operates only where the obligation is by reason of the instrument itself." In *French v. Patton* (b) the plaintiff declared on the altered contract. Most of the cases cited were cases of deeds and bills of exchange, except that of *Henfree v. Bromley* (c), which is in point; for there is no such distinction as that which has been contended for between awards and instruments inter partes. It was there held that, though the alteration by the umpire was void, yet the award was good for the original sum awarded, which was still legible, *the same as if such alteration had been made by a mere stranger*, without the privity or consent of the party interested. There Lord *Ellenborough*, C. J., says, "I see no objection to the award for the original sum of £57; for the alteration made by him afterwards was no more than a mere spoliation by a stranger, which would not vacate the award." And he again says, he considers the alteration "as if it had been made by a stranger—by a mere spoliator;" and he concludes as follows:—"If the alteration had been made by a person who was interested in the award, I should have felt myself pressed by the objection; but I can no more consider this as avoiding the instrument, than if it had been obliterated or cancelled by accident." The cases of bills of exchange are obviously distinguishable, because there the altered bills, when produced, do not appear to be the same securities. That was the ground of the decision in *Calvert v. Baker* (d). Lord *Abinger*, C. B., there says, "The plea in substance is, 'I did not accept the bill in the manner you charge;' and the plaintiff proves a bill in the form in which he

(a) 11 Law J. Rep., Exch. 180; (c) 6 East, 309.
9 M. & W. 469. (d) 4 M. & W. 417.
(b) 9 East, 351.

did not accept it; his plea is, therefore, made out." There are authorities to shew, even in the case of a deed, that the mutilation of it does not interfere with its effect upon the estate vested. *Bolton v. The Bishop of Carlisle* (a). *Eyre*, C. J., there says, "I hold clearly that the cancelling a deed will not divest property which has once vested by transmutation of possession:" and he adds, "God forbid a man should lose his estate by losing his title deeds." And in *Perrott v. Perrott* (b), Lord *Ellenborough*, C. J., said, on that case being cited, "I do not suppose it will be contended, that, if an interest were vested by deed, the destroying the evidence of it would divest the interest." So, in *Hutchins v. Scott* (c), Lord *Alderson*, B., says, "It is difficult to understand why an alteration by a stranger should in any case avoid the deed—why the tortious act of a third person should affect the right of the two parties to it, unless the alteration goes the length of making it doubtful what the deed originally was, and what the parties meant." And Lord *Abinger*, C. B., says, "Suppose the stranger destroyed instead of altering it?" Again, in giving his judgment, Lord *Abinger* says, "No case has gone the length of saying, that when a deed is altered and thereby vitiated, it ceases to be evidence: it may be so with reference to the stamp laws The old law was, no doubt, much more strict than it has been in modern times. Originally there could be no such thing as founding upon a deed, without making profert of it; and it was but an invention of the pleaders, growing out of a decision of Lord *Mansfield's*, to allege, as an excuse for not making profert, a loss of the deed by time and accident, founded on the presumption to be derived from long possession and enjoyment. I can hardly see how such a course is consistent with the old authorities, which say that any alteration, even by a stranger, shall

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(a) 2 H. Bl. 259.

(b) 14 East, 431.

(c) 2 M. & W. 814.

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vitiate a deed." And *Alderson*, B., takes the case in its fullest extent:—"This is an agreement, and the rules as to deeds, to which there is a plea of non est factum, are not applicable. Then we are to look to the instrument, to see what was originally the intention of the parties." Now, here there once was a cause of action, and the right of action having once vested, it is no answer to say that the agreement has been altered since. Even in the case of a deed, if the estate has once vested, the deed will not be vitiated except as to its production. In Buller's N. P., 267, the point is thus put:—"It has been said, that where a thing lies in livery, a deed, formerly sealed, may be given in evidence, though the seal be afterwards broken off, for the interest passed by the act of livery. So they say, if the conveyance were made by lease and release, and the uses were once executed by the statute, they do not return back again by cancelling the deed." Where non est factum is pleaded, it puts in issue the existence of the deed; but if that technicality is got over, the deed is not affected by an alteration, as the alteration has no retrospective effect. There is, however, no difficulty as to producing the deed, if it be not altered upon plea pleaded: *Nichols v. Haywood* (a), *Michael v. Scockwith* (b), *Moor v. Salter* (c). Where the right is once vested, it cannot be taken away by the alteration. Here the right to bring the action was vested before the alteration took place.

But it has been said, that the plaintiff is not entitled to avail himself of this objection, and that he ought to have replied that the instrument was altered by a stranger without his knowledge or consent: but the plea does not disclose that which amounts to a defence, because it ought to have shewn such an alteration as rendered the action not maintainable. The plea does not shew that the alteration

(a) *Dyer*, 59.

(b) *Cro. Eliz.* 120.

(c) 3 *Bulstr.* 79.

was made before the right of action vested. It admits a cause of action, and shews nothing to get rid of it.

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The judgment of the Court was now delivered by

Lord ABINGER, C. B.—This was an action of assumpsit against the defendant, on a written guarantie not under seal. The defendant pleaded, among other pleas, that, after the guarantie had been given to the plaintiff, and while it was in his hands, it was altered in a material particular by some person to the defendant unknown, and without his consent, by affixing a seal, so as to make it appear to be the deed of the defendant, by reason of which alteration the said guarantie became void in law.

On the trial of the cause, this plea was found for the defendant. All the other issues were found for the plaintiff, who obtained a rule nisi for entering judgment in his favour non obstante veredicto, on the ground that the facts stated in the plea afforded no defence to the action.

This rule was argued in last Michaelmas term; and the Court took time to consider its judgment, on account of the importance of the question involved, namely, whether, where an instrument, not under seal, and not being a bill of exchange or promissory note, is altered by a stranger in a material part, without the privity of the party to be affected by it, such alteration makes the instrument void.

There is no doubt but that, in the case of a deed, any material alteration, whether made by the party holding it or by a stranger, renders the instrument altogether void from the time when such alteration is made. This was so resolved in *Pigot's case* (a), and though it was contended in argument, that the rule has been relaxed in modern

(a) 11 Rep. 27.

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times, we are not aware of any authority for such a proposition, when the altered deed is relied on as the foundation of a right sought to be enforced. The case is different, where the deed is produced merely as proof of some right or title created by, or resulting from, its *having been executed*; as in the case of an ejectment to recover lands which have been conveyed by lease and release, or now by release only. There, what the plaintiff is seeking to enforce, is not, in strictness, a right under the lease and release, but a right to the possession of the land, resulting from the fact of the lease and release having been executed. The moment after their execution, the deeds become valueless, so far as they relate to the passing of the estate, except as affording evidence of the fact that they were executed. If the effect of the execution of such deeds was to create a title to the land in question, that title cannot be affected by the subsequent alteration of the deeds; and the principles laid down in *Pigot's case* would not be applicable. But if the party is not proceeding by ejectment to recover the land conveyed, but is suing the grantor under his covenants for title, or other covenants contained in the release, there the alteration of the deed in any material point, after its execution, whether made by the party or by a stranger, would certainly defeat the right of the party suing to recover.

The principle thus recognized in *Pigot's case*, with respect to deeds, was, in the case of *Master v. Miller* (a), established as to bills of exchange and promissory notes; and the ground on which the decision in that case was put by the Court of error was, that in all such instruments a duty arises analogous to the duty arising on deeds. The instrument itself proves the duty, without any further proof to establish it. *Ubi eadem est ratio, eadem est lex*. The law, having been long settled as to deeds, was held

(a) 4 T. R. 320, and 2 H. Bl. 141.

to be also applicable to these mercantile instruments, which, though not under seal, yet possess properties, the existence of which in the case of deeds was, it must be presumed, the foundation of the rule.

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But the decisions do not stop there. In *Powell v. Divett* (a), the Court of King's Bench extended the doctrine to the case of bought and sold notes, holding, that a vendor who, after the bought and sold notes had been exchanged, prevailed on the broker, without the consent of the vendee, to add a term to the bought note for his (the vendor's) benefit, thereby lost all title to recover against the vendee. The ground on which the Court proceeded was, that the bought note, having been fraudulently altered by the plaintiff, could not be received in evidence for any purpose, and as no other evidence was admissible, the plaintiff had no means of asserting any claim whatever. The Court considered that *Master v. Miller* expressly decided the point before them, and Mr. Justice *Le Blanc*, taking, it should seem, his view of that case, not from the Judges in the Exchequer Chamber, but from the wider line of argument adopted by Lord *Kenyon* in the Court below, expressly stated that *Master v. Miller* was not confined to negotiable securities. Now, the case of *Powell v. Divett* was decided more than thirty years ago, and has ever since been treated as law; and therefore, although we certainly feel that there are difficulties in the extent to which it carries the doctrine of *Pigot's case*, yet we do not feel it open to us, if we were inclined to do so, to act against that authority; and the only question, therefore, is, whether there is any real distinction in principle between this case and that of *Powell v. Divett*. The only difference is, that, in *Powell v. Divett*, the alteration was made by the plaintiffs, who held the written instrument; whereas, in this case, it is not ascertained by whom the alteration was made:

(a) 15 East, 29.

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the jury finding that the alteration was made by some person to them unknown, whilst the document was in the hands of the plaintiff.

After much reflection, we are of opinion that this does not create any real distinction between the two cases. The case of *Powell v. Divett* was decided on the ground, that written instruments, constituting the evidence of contracts, are within the doctrine laid down in *Master v. Miller*, as applicable to negotiable securities; and the doctrine established in *Master v. Miller* was, that negotiable securities are to be considered, no less than deeds, within the principle of the law laid down in *Pigot's case*. That law is, that a material alteration in a deed, whether made by a party or a stranger, is fatal to its validity; and applying that principle to the present case, it is plain that there is no real difference between this case and that of *Powell v. Divett*. There the alteration was made by a party—here by a stranger: but this, according to *Pigot's case*, is immaterial; and indeed, in this respect, the present case resembles *Master v. Miller*, for there the jury did not find by whom the alteration was made, but only that it was made by some person to them (the jurors) unknown, whilst the instrument was in the hands of Williams & Cooke, the payees and first indorsers. The authority of *Master v. Miller* has been considered by this Court as established, in the case of *Lord Falmouth v. Roberts* (a). We may add, that the doctrine of *Pigot's case* has been applied to policies of assurance, though its operation has been, it may be said, eluded, by considering a policy as a peculiar instrument, embracing several contracts with different individuals. The case has not been distinguished on the ground that the doctrine was limited to deeds and instruments of a similar character; (such as bills of exchange and promissory notes); *Sanderson v. Symonds* (b). Con-

(a) 9 M. & W. 471, and 11 Law J., N. S., (Exch.), 180.

(b) 1 B. & B. 426.

sidering it, therefore, impossible to distinguish this case from *Powell v. Divett*, we think that the plea affords a good defence to the action, and consequently the rule for judgment non obstante veredicto must be discharged.

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Rule discharged.

DOE *d.* CLAYTON, Bart., *v.* WILLIAMS.

June 15.

THIS was an ejectment to recover possession of a brick-kiln and certain outhouses or sheds adjoining thereto, situate on Marlow Common, in the parish of Marlow, in the county of Bucks. At the trial before *Coleridge, J.*, at the last Assizes for Buckinghamshire, the following facts appeared :—

A grant of a *reputed* manor will not pass a freehold interest in the waste within the ambit of the manor, nor in any specific tenement of the grantor.

Sir William Clayton, Bart., the father of the lessor of the plaintiff, by indentures of lease and release, dated 14th and 15th July, 1785, being the settlement made in contemplation of his intended marriage, and reciting that he was seised in fee of (*inter alia*) the manor of Great Marlow, granted and released to trustees "all those the several manors or lordships, or reputed manors or lordships, of Great Marlow and Harleyford, in the county of Bucks, &c., and all houses, outhouses, edifices, buildings, lands, wastes, waste grounds, royalties, rights, commodities, advantages, and appurtenances whatsoever, to the said manors or reputed manors, and hereditaments, and all or every of them belonging or in anywise appertaining," to the use of Sir William Clayton, the settlor, for life, with remainders to his issue in tail, and, for default of such issue, to the use of himself, his heirs and assigns for ever. It did not appear that any manorial courts had been held for upwards of a century, (the last court-roll produced being

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of the date of 1728), nor was there any evidence that there were any freehold or copyhold tenants of the manor. The brick-kiln and sheds in question had been built upwards of twenty years before the year 1785. They were within the ambit of the manor, but not upon any part of the existing waste. The defendant claimed title to them under indentures of lease and release of the 28th and 29th May, 1795, whereby the said Sir William Clayton conveyed to Thomas Williams, the defendant's ancestor, certain messuages, tenements, &c. in the parish or township of Great Marlow, as the same were comprised in certain other deeds of lease and release of the 14th and 15th July, 1785.

It was contended, for the lessor of the plaintiff, that the brick-kiln and outhouses passed, under the words of the marriage settlement of 1785, to the trustees, to the uses of that settlement; that, therefore, the late Sir W. Clayton had only a life interest therein, and could not convey more to Williams. For the defendant, it was insisted that the (so called) manor of Great Marlow was merely a manor by reputation, and therefore the word "manor" was not sufficient to pass the premises in question, although within its ambit. A verdict was taken for the plaintiff, subject to a motion to enter a nonsuit.

In Easter term, *Biggs Andrews* obtained a rule nisi for a nonsuit, pursuant to the leave reserved: against which, in this term, (June 2 and 3),

Byles, Serjt., and *O'Malley*, shewed cause.—The brick-kiln and sheds in question formed part of the manor of Great Marlow, and passed to the trustees of the settlement of 1785, under the word "manor." The argument for the lessor of the plaintiff must be, that they were intended to be excepted out of the grant of the manor; but, if such intention existed, they would surely have been excepted by express words. The rule on this subject is thus laid

down in Preston's Conveyancing, Vol. 2, p. 461 :—" When the words of description used in the deed under preparation embrace, under a collective name or general denomination, more lands than are intended to pass, there should be an exception of such of the lands, &c. as are not intended to be conveyed. This exception should be made by the words 'excepting out of the grant &c. hereby made,' or some other words to that effect. An exception is particularly important where there is a grant of a manor, and some of the demesnes are to remain the property of the grantor, or are to be conveyed to other persons." Again, in Sheppard's Touchstone, p. 92, it is said: "This word (manor) is a word of large extent, and may comprehend many things; and, therefore, by the grant of the manor, without the words of cum pertinentiis, do pass demesnes, rents, and services, lands, meadows, pastures, woods, commons, advowsons appendant, villains regardant, courts baron, and perquisites thereof, that are in truth, at the time of the grant, parcel of the manor. By the grant of a manor also divers towns may pass. An honour also may pass by this name; and so may a castle, or a hundred." There are many authorities to the like effect: Year Book, 8 Hen. 7, pl. 4; 10 Hen. 7, 19 b.; Dyer, 207: *Hill v. Graunge* (a); *Sommers' case* (b); and Cruise Dig., p. 39, s. 26.

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B. Andrews and *Gunning*, *contra*.—There is no specific description of these premises in the settlement of 1785, and, therefore, it can only be contended for the plaintiff that they passed under the general word "manor." It may be conceded that that word may have a more extended signification given to it; but there is no authority that, in a deed framed as this is, it would pass more than

(a) Plowd. 168.

(b) Godb. 411.

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the manorial jurisdictions and royalties, the deed containing an express conveyance of part of the demesne lands of the manor. The proper construction is, that it was not intended to pass, and did not pass, any part of the demesnes, except those which were so specifically described. It appeared that this kiln had existed for more than twenty years at the date of the settlement of 1785; it had, therefore, ceased to be waste, and had become, if any thing, part of the demesnes of the manor. The deed itself speaks of it "as a manor or *reputed* manor;" and no courts having been held, at least for so long a period, and no tenants of the manor being shewn to exist, this had ceased to be, if it ever was, a manor in fact, and had become a manor by reputation only, a grant of which, *eo nomine*, would not pass the demesne lands. In *Shep. Touchst.* 88, one of the constructions of deeds is said to be, "that that which is generally spoken be generally understood, unless it be qualified by some special subsequent words, as it may be; for if one be seised of a manor wherein there is a park, by this the park will not pass."—They cited also *Co. Litt.* 42. a, and *Com. Dig.*, Parols; and distinguished *Moseley v. Motteux* (a), on the ground that in that case there were words amply sufficient to have passed the advowson appendant to the manor, but for the intention of the parties to the contrary which appeared from the recitals of the deed.

Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B.—There was a case of *Doe d. Clayton v. Williams*, which was very ingeniously argued by the counsel on both sides, in the course of the present term. The question was reduced to this, whether or not the brick-kiln, for which this ejectment is brought, and the buildings

(a) 10 M. & W. 533.

annexed to it, passed under the word "manor" in the marriage settlement of the late Sir William Clayton. The wastes of the manor passed by express words; but it is admitted that the property in question, which had formerly been waste, constituted no part of the waste, either now or at the time when the conveyance was made; and therefore the question is, whether it passed under the word "manor."

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A manor, it is said, consists essentially of the demesnes and services. It appeared in evidence, in this case, that there had been no court held in this manor for above a hundred years. A court-roll was produced, dated as far back as 1728. It did not appear that there were any copyholders, nor that there were any freehold tenants holding of the manor. There was, therefore, no court baron, which is incident to a manor, of freeholders holding of the manor: and for a customary court there was no occasion, because there were no copyholders. The manor, therefore, appears to have gone. It might have been a manor formerly, as it does appear that there were court-rolls of a court held upwards of a hundred years ago. What those court-rolls were was not distinctly explained; possibly rolls of admission of copyholders: but I think we must take it upon the evidence as it stands, that there was no proof of there being any freeholders holding by any chief rent of the lord of the manor, or of any copyholder holding by copy of court-roll. Therefore, the manor became a *reputed manor*. Now, although the wastes and demesnes will pass by a conveyance of the manor, if nothing more be said, yet, if the manor be lost, and have become only a manor by reputation, there is no case which I am aware of that goes the length of deciding, that, under the words "reputed manor," the freehold interest in wastes, or in any specific tenement that is possessed by the grantor, will pass. A man may grant a certain tenement and his reputed manor by such a name; but if there

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be no real manor, I cannot conceive that anything else would pass but that tenement, and the right (although, perhaps, that may be questionable) to appoint a gamekeeper, within certain limits, of that which was formerly the manor. But there being nothing substantial in the word "manor," I cannot, as at present advised, suppose that anything passed by that word where there is only a manor by reputation. We think, therefore, that there ought to be a new trial on this point. If there be a manor in existence, or if there was a manor in existence in 1785, when the marriage settlement was made which forms the subject of the present question, that will be open to further evidence. If there be any proof given that the lord of the manor at the present day could hold a court baron, or that this has any of the essential properties of a manor, or that it had any such existing in the year 1785, then it may be fairly contended that this brick-kiln was a demesne of that manor, and passed to the trustees of the settlement. But if the manor is entirely gone, and exists merely by reputation, it appears to me that the case is exactly the same as if this had happened:—Suppose the lord of the manor had enfranchised all his copyholders, and had released all the freeholders from any claim of chief or other rents, so that they ceased to hold of the manor, then the manor is gone; but the lord would still retain, as owner of the soil and wastes, the ownership of those premises which before formed part of the demesnes of the manor; but if, under such circumstances, he were to convey a manor by reputation, such conveyance would mean nothing, for it certainly could not be held to convey his freehold property in the wastes, and what had formerly been the demesnes. I should apprehend they would still remain vested in him; not vested in him any longer by reason of their connexion with the manor, but because they had been his before, and he had done nothing to take them out of him.

On this ground, therefore, there ought to be a new trial,

to give the lessor of the plaintiff an opportunity, if he can do so, of proving that there was a manor in existence in 1785, when Sir William Clayton passed it by the settlement. If there was, then the plaintiff would be entitled to a verdict; if there were not, and the manor was only what it appears to be on the present state of the evidence, a manor by reputation, then it appears to us that nothing actually passed, or could pass, by that conveyance; and, therefore, we think there ought to be a new trial to ascertain that fact.

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Rule absolute, for a new trial.

STOCKMAN v. PARR.

June 15.

ASSUMPSIT by the indorsee against the drawer of a bill of exchange for £53, dated the 19th of December, 1842, payable three months after date.

Plea, that the defendant had not due notice of dishonour of the bill.

At the trial, before *Parke, B.*, at the London Sittings in this term, the plaintiff, to prove the dishonour of the bill, put in evidence the following letter, sent to the defendant by the plaintiff's attornies:—

"Sir,—We are instructed by Mr. Henry Stockman, of this city, to apply to you for payment of the undermentioned sums, and to acquaint you, that, unless the same, together with 5*s.*, the costs of this application, be paid at our office on or before Monday next, at twelve o'clock, legal proceedings will be commenced against you, to enforce payment thereof, without further application. We are, Sir, your obedient servants,

"Batchellor, Harford, & Staunton."

enforce payment thereof without further application." The following was the memorandum at the foot of the letter:—"53*l.* 6*s.* 6*d.* due on your dishonoured note, dated the 19th of Decem- last; 5*s.* costs of letter—53*l.* 11*s.* 6*d.*."—*Held*, that the notice of dishonour was sufficient.

In an action by the indorsee against the drawer of a bill of exchange for 53*l.*, the charges for noting, &c., being 6*s.* 6*d.*, the following notice of dishonour was given:—
"We are instructed by H. S. (the plaintiff) to apply to you for payment of the under-men- tioned sum, and to acquaint you, that, unless the same, together with 5*s.*, the costs of this ap- plication, be paid at &c., on &c., legal proceedings will be commenced against you to

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	Costs of Letter.	
	<u>£53 11 6</u>	

" Mr. Thomas Parr, Wroughton."

The charges of noting, &c., amounted to 6*s.* 6*d.* It was objected at the trial that this letter was not a sufficient notice of dishonour, but the learned Judge overruled the objection, holding the notice to be sufficient in the absence of any evidence on the part of the defendant to shew the existence of another bill; and the plaintiff had a verdict, with leave to the defendant to move to enter a nonsuit.

Hugh Hill now moved accordingly.—The notice of dishonour is insufficient, for the bill is misdescribed, both as to its amount and its character. The instrument was, in fact, a bill of exchange, but it is here called a "note." The sum for which it is drawn is £53, and not, as it is here stated, 53*l.* 6*s.* 6*d.* Therefore, in two respects, what may be called the earmarks of the instrument are incorrectly stated. The rule laid down by *Abbott, C. J.*, in *Hartley v. Case* (a), is, that "the language must be such as to convey notice of what the bill is, and that payment of it has been refused by the acceptor." [*Parke, B.*—In *Shelton v. Braithwaite* (b), we held, that if there was more than one bill to which the letter could apply, it lay upon the defendant to prove that fact, in order to shew its uncertainty.] There the instrument was called a *draft*, but every bill is a draft, and therefore it would not be incorrect. Here there is a positive misstatement of what the instrument is. In *Messenger v. Southey* (c), which was an action on a promissory

(a) 4 B. & Cr. 339; 6 D. & R. 505.

(b) 7 M. & W. 436.

(c) 1 Man. & Gr. 76; 1 Scott, N. R. 180.

note for 15*l.* 2*s.* 6*d.* by the indorsee against the drawer, the following letter from the plaintiff to the defendant was held to be an insufficient notice of dishonour:—"This is to inform you, that the bill I took of you (15*l.* 2*s.* 6*d.*) is not took up, and 4*s.* 6*d.* expense, and the money I must pay immediately." And in *Beauchamp v. Cash* (a), which was cited in that case, *Abbott*, C. J., held, that a notice, stating a bill to have been *drawn* by a party, when, in fact, he was only an indorsee, was insufficient. The present is within the principle of those cases.

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PARKE, B.—I entertain the same opinion which I expressed at the trial, that, in the absence of proof of the existence of any other bill, the notice of dishonour was sufficient. In this notice there is only one misdescription, the calling the instrument a *note* instead of a bill. It gives the true date of the instrument; and the sum demanded is not stated to be the amount of the bill; the 53*l.* 6*s.* 6*d.* is made up of the amount due on the bill, and the notarial charges, which appeared on the notarial ticket. There was sufficient evidence of identity to go to the jury.

LORD ABINGER, C. B., and ROLFE, B., concurred.

Rule refused.

(a) Dow. & Ry. N. P. C. 3.

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June 15.

HAYWOOD and Others v. BIBBY.

An indenture recited, that, in consideration of £400, (part of £500 agreed to be advanced by the plaintiff to the defendant), paid to S., R., and P., by the plaintiff, in discharge of all principal and interest owing to them as mortgagees, by virtue of a certain other surrender, they, the said S., R., and P., surrendered into the hands of the lord certain lands, to the intent that the lord might re-grant the same to the plaintiff, in trust to sell the same, and retain the said sum of £500. The indenture then stated, that the defendant covenanted with the plaintiff to pay him the sum of £500, with interest, on a certain day, and that, in default of payment, the plaintiff might enter upon and enjoy the land. The indenture was stamped with two stamps, of

COVENANT on an indenture, by which the defendant covenanted to pay the plaintiff the sum of £500, with lawful interest, on the 22nd of November, 1839. Plea, non est factum.

At the trial, before *Parke, B.*, at the London sittings in this term, the plaintiff tendered in evidence an indenture, dated the 22nd of May, 1839, made between Charles Posnett, of the first part, E. Skelcoron, J. Rogers, and A. Parsons, of the second part, the defendant of the third part, and the plaintiffs of the fourth part; which recited, that in consideration of the sum of £400 (part of the sum of £500, agreed to be advanced by the plaintiffs to the defendant), paid to the said E. Skelcoron, J. Rogers, and A. Parsons, by the plaintiffs, in discharge of all principal, interest, &c. owing to them as mortgagees, (by virtue of a certain other surrender therein recited); they, the said E. S., J. R., and A. P., surrendered into the hands of the lord of the manor of, &c., all that piece or parcel of land, &c., to the intent that the lord might re-grant the same to the plaintiffs, in trust to sell the same, and retain the said sum of £500, &c. The indenture then stated, that the defendant covenanted with the plaintiffs to pay them the said sum of £500, with lawful interest for the same, on the 22nd day of November, 1839, and that, in case default should be made in payment of the same, the said plaintiffs should and might enter upon and enjoy the said piece or parcel of land, &c. The deed was stamped with two stamps, of 1*l.* 15*s.* and 1*l.* 5*s.* The cause was tried as undefended, but the learned Judge, being of opinion that the deed

1*l.* 15*s.* and 1*l.* 5*s.*:—*Held*, that this was not "a declaration or deed for defeating or making redeemable or qualifying any covenant, &c., intended as a security for money," within the meaning of that clause in the Stamp Act, 55 Geo. 3, c. 184, Schedule, Part 1, "Mortgage," but a mere declaration of trust of the second surrender; and that it did not require an ad valorem stamp.

ought to have been stamped with an ad valorem mortgage stamp, refused to admit it in evidence, and the plaintiff was nonsuited, leave being reserved to him to move to enter a verdict for the amount of the principal and interest.

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R. V. Richards having obtained a rule accordingly,

Martin shewed cause.—This is not a mere transfer of a mortgage, but an absolute mortgage itself. It appears from the deed, that certain persons being mortgagees of the property in question for the sum of £400, the defendant requested the plaintiffs to pay off their mortgage, and advance him £100 in addition upon the security of the same property. That amounts to an absolute mortgage, and is subject to an ad valorem duty. It falls within the description in the Stamp Act, 55 Geo. 3, c. 184, Sched., Part 1, "Mortgage," in the fourth paragraph, of "any defeazance, declaration, or other deed or writing, for defeating or making redeemable, or explaining or qualifying, any conveyance, &c. of any lands, estate, or property whatsoever, which shall be apparently absolute, but intended only as a security." This is obviously a qualification of the surrender, for the lord is to re-grant the same to the plaintiffs in trust to sell, and retain out of the proceeds the said sum of £500. And then the deed contains a power of entry in case default shall be made in payment of the £500 and interest; so that the plaintiffs have no right to enter until default is made in payment of the money. [*Rolfe*, B.—No; it merely shews that there is no remedy on that covenant until default is made.] It is submitted that it is a defeazance on the transfer of the property, and falls within the description of a defeazance, declaration, or deed intended as a security for money, within the meaning of the above clause in the 55 Geo. 3, c. 184, and does not fall within the first and second sections of 3 Geo. 4, c. 77, which exempt from the ad valorem duty

Each. of Pleas, transfers of mortgages which have already paid such duty.
1843. This case is governed by the decision in *Lant v. Peace* (a).
HAYWOOD There the defendant mortgaged land to one L. for £400;
v. afterwards the defendant borrowed £1000 more from L.,
BISBY. and mortgaged other land to him as a security for the
whole £1400; and it was held that, under 55 Geo. 3, c.
184, the last mortgage required an ad valorem mortgage
stamp, with progressive duty, on the £1000, and also a
deed stamp on the fresh security upon the £400, as a deed
not otherwise charged.

Whitmore and *T. Allen*, in support of the rule, were
stopped by the Court.

LORD ABINGER, C. B.—I am of opinion that an ad va-
lorem mortgage stamp was not required in this case. The
defendant merely covenants by the deed to pay the sum of
£500, and that, in default of payment, the plaintiffs shall
have power to enter upon and enjoy the property. That
cannot amount to a mortgage. The rule must therefore
be absolute.

PARKE, B.—Upon consideration, I am of the same
opinion. The deed in question amounts only to a declara-
tion of trust of the second surrender, and does not fall
within the description of a second mortgage. It does not
fall within the description of a declaration or deed for de-
feating or making redeemable, or explaining or qualifying
any conveyance &c., so as to be a security for money; and
therefore does not require any ad valorem stamp.

ROLFE, B., concurred.

Rule absolute.

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1843.

June 15.

HARRISON and Another v. WEAY.

WARREN had obtained a rule, calling upon the plaintiff to shew cause why the copy of the writ of summons should not be set aside for irregularity. The rule was obtained on an affidavit of the defendant, that he had been served in Cheapside, in the city of London, with a copy of a writ of summons issued into the county of Middlesex, and that he had *been informed and believed* that any portion of Cheapside was more than half a mile from the county of Middlesex.

A party seeking to set aside the service of a writ of summons, on the ground of its having been served in a wrong county, must state positively that the place of service is not within the county into which the writ issued, or within the prescribed distance from the boundary thereof; and it is not sufficient to state that he has *been informed and believed* that the place of service is more than half a mile from the county into which the writ issued.

Erle shewed cause.—The authorities shew, that a party seeking to set aside service of process must swear positively, and not merely according to his belief, that the place where he was served is beyond the prescribed distance from the boundary of the county into which the writ issued, and that there is no dispute about the boundary: *Lewis v. Newton* (a), *Coulson v. King* (b), *Thomson v. Barton* (c), and *Storer v. Rayson* (d). This affidavit is uncertain and ambiguous, and does not shew that there is no dispute as to the boundary.

Warren, in support of the rule.—The defendant speaks according to his information and belief, and that is sufficient to call upon the plaintiff for an answer, to repel the presumption arising from his statement.

Lord ABINGER, C. B.—A party seeking to set aside a writ for such an irregularity as the one here complained of ought to state positively that the place of service is not within the county into which the writ is issued, or within

(a) 4 Dowl. P. C. 355.

(b) 2 Cr. & J. 474.

(c) 1 Dowl. P. C. 428.

(d) 3 B. & Cr. 158; 4 D. & R.

739.

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the distance from the boundary limited by the act of Parliament.

PARKE, B., and ROLFE, B., concurred.

Rule discharged.

June 15.

HANDS v. CLEMENTS.

An affidavit described the deponent as "Edward Charles Pownall," but the signature to it was "Cha^s. Ed. Pownall:"—*Held*, that this was no objection.

The affidavit was intitled, "In the Exchequer:"—*Held*, sufficient; it appearing by the jurat to be sworn before an officer of this Court.

ON a rule calling upon the plaintiff to shew cause why the proceedings should not be stayed until security was given for costs,

F. V. Lee, on shewing cause, objected to the affidavit on which the rule was obtained—first, that it purported to be made by "Edward Charles Pownall," whereas the signature to it was "Charles E. Pownall;" secondly, that it was intitled, "In the Exchequer," instead of "In the Exchequer of Pleas." He contended, that the title of the affidavit left it uncertain whether the proceedings were on the plea side of the Exchequer, or on the receipt of the Exchequer, or on the Crown side of the Exchequer.

SED PER CURIAM (a).—There is no weight in either of the objections. With respect to the first, it is a mere transposition of the deponent's christian names. If the statement is false, he might be indicted on that affidavit. As to the other objection, it appears by the jurat that it was sworn before a commissioner of this Court, who is an officer on the plea side of the Court; and the officers inform us that it is usual so to intitle papers. We think, therefore, it is sufficient.

Petersdorff, in support of the rule, was not called upon.

Rule absolute.

(a) Lord Abinger, C. B., Parke, B., and Rolfe, B.

Exch. of Pleas,
1843.

BURTON v. GRIFFITHS and Another.

June 9.

ASSUMPSIT.—The declaration stated, that, before and at the time of the making of the agreement thereafter mentioned, a certain rate for the relief of the poor of the township of Bersham, in the county of Denbigh, had been and was made by the churchwardens and overseers of the said township upon the inhabitants thereof, and duly allowed by &c., two of her Majesty's justices of the peace &c.: and whereas before and at the time of the making of the said agreement, the defendants were overseers of the poor of the said township, and the plaintiff and certain other persons [naming them] then respectively being inhabitants of the said township, and persons aggrieved by the said rate, had respectively given separate notices in writing, signed by the plaintiff and the said other parties respectively, to the churchwardens and overseers of the said township, of their intention severally to appeal against the said rate at certain sessions in such notices respectively mentioned, to wit, the general quarter sessions to be holden in and for the county of Denbigh, on a certain day, which, at the time of the making of the said agreement, had not arrived, to wit, the 29th day of June, 1841; of all which premises the defendants, before and at the time of making the agreement thereafter mentioned, had notice: and thereupon heretofore, to wit, on the 28th day of June,

The defendants, overseers of the township of B., agreed with the plaintiff and several other persons, who had given notices of appeal against a poor-rate made for the township, that all matters in difference between the defendants, as such overseers, and the plaintiff and the other appellants, should be referred to the decision of two persons named; and that the costs of the plaintiff and the other appellants, incurred by them in relation to the appeals, up to the time of the agreement, should be taxed, and paid by the overseers of the said township. A declaration in assumpsit against the defendants, for

nonpayment of such costs, alleged that they were taxed in a reasonable time after the making of the agreement, of which the defendants had notice, and were requested to pay the amount, but that they had not paid it, and it still remained unpaid to the plaintiff. The defendants pleaded, that the costs were not taxed in a reasonable time after the making of the agreement; on which traverse an issue was joined, and found for the defendants.

Held, that the question, whether such reasonable time had elapsed, was a question for the decision of the jury, and not of the Judge.

Held, also, on motion for judgment for the plaintiff non obstante veredicto, that, if the meaning of the agreement was that the defendants should pay the costs when taxed, the traverse was a material one, because it was reasonable that they should have the means of paying out of the parochial funds while they remained in office.

Semble, also, (per Lord Abinger, C. B.), that, if the agreement was to be construed as a guarantee that the overseers for the time being should pay, the declaration was bad for not averring a demand upon, and nonpayment by, the overseers for the time being.

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1843.

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1841, for the purpose of putting an end to the said appeals respectively, it was agreed by and between the defendants and the plaintiff and the said other persons [naming them]. that all matters in difference between the defendants, a such overseers as aforesaid, and the plaintiff &c. respectively, should be referred to the decision and determination of Edward Tench and Isaac Taylor, arbitrators chosen by and between the said parties respectively, and that the respective costs of the plaintiff &c. &c. by them respectively incurred in relation to the said several appeals, up to the time of the making of the said agreement, including the expense theretofore incurred in and by reason of certain surveyors having gone over part of the said township in reference to the matters of the said appeals, should be taxed by the proper officer of the said court of quarter sessions, to wit, the clerk of the peace for the said county, and should be paid by the overseers of the said township. The declaration then, after alleging mutual promises, and performance of the agreement by the plaintiff, averred, that, although afterwards, and in a reasonable time in that behalf, to wit, on the 13th day of June, 1842, the costs of the plaintiff in relation to the said appeal of the plaintiff against the said rates, up to the time of the making of the said agreement, including &c., were taxed by J. P., then being clerk of the peace of the said county, and the proper officer of the said court of quarter sessions in that behalf, at the sum of 17*l.* 6*s.* 8*d.*, whereof the defendants had notice, and were requested by the plaintiff to pay the same; and although a reasonable time for the payment of the said sum of money had elapsed before the commencement of this suit, yet the defendants had not paid the same or any part thereof, but the same still remained unpaid to the plaintiff. There was also a count on an account stated.

Pleas—first, non assumpserunt; secondly, that the costs of the plaintiff in relation to the said appeal of the plaintiff against the said rate were not taxed in a reasonable time

after the making of the said agreement, in manner and form &c.; concluding to the country. Issues thereon.

At the trial, before *Maule, J.*, at the last Chester Assizes, the defendants put in the following agreement, signed by the defendants:—

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“Denbighshire Quarter Sessions.

“John Burton against the overseers of the township of Bersham; Jonathan Jones against same,

[and six others.]

“Notices of appeal against a poor-rate allowed on the 9th day of June instant, for the said township of Bersham, having been given in the above cases, the appeals being to the quarter sessions to be held for the county of Denbigh on the 29th instant, it is hereby agreed by the said parties to leave all matters in difference between them to the decision of Mr. Edward Tench, of &c., and Mr. Isaac Taylor, of &c.; the costs of the appellants up to this time, including the expense of surveyors going over part of the said township, to be taxed, and paid by the overseers of the said township. In case Mr. Edward Tench and Mr. Isaac Taylor cannot agree upon the matters referred to them, each of the said parties shall be at liberty to appeal to the next October quarter sessions for the said county against the said rate, and such appeals shall be in all respects valid, and the appellants shall be in precisely the same situation as they would be on the 29th instant. Dated this 28th day of June, 1841.

“THOMAS ROBERTS, }
“JOS. GRIFFITHS, } Overseers of Bersham.”

The costs of the plaintiff and the other appellants, up to the time of the agreement, were taxed by the clerk of the peace on the 13th June, 1842: there had been a previous taxation on the 1st November, 1841, which, however, was cancelled in consequence of the appellants not having had notice thereof. The defendants went out of office in March, 1842.

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It was contended for the defendants, first, that the defendants were not personally liable in this action, their year of office having expired; and, secondly, that the clerk of the peace had no authority to tax the costs under the agreement. The learned Judge reserved these points. The defendants' counsel then went to the jury on the second issue; but it was insisted for the plaintiff that the question as to the lapse of a reasonable time before the taxation was a question for the Judge, and not for the jury, to determine. The learned Judge, however, left it to the jury, and they found a verdict thereon for the defendants, leave being reserved to the plaintiff to move to enter a verdict for him, if the Court should think the question ought to have been determined by the Judge, and in favour of the plaintiff.

In Easter Term, *E. V. Williams* obtained a rule to shew cause why the verdict should not accordingly be entered for the plaintiff on the second issue, or why judgment should not be entered for him non obstante veredicto.

Jervis and *Welsby* now shewed cause.—First, it is to be implied from the agreement set forth in the declaration, that the costs are to be taxed within a reasonable time. It would be most unreasonable that the defendants, whom it was clearly *intended* to charge in their character of overseers only, should be deprived of the means of paying the costs out of the parochial funds (which they would be entitled by law to do) by the taxation being delayed till after the expiration of their year of office. In *Macdougall v. Robertson (a)*, it was held that a submission, by which an award was to be made on or before the — day of —, or such day to which the submission might be enlarged, was a general authority, to be executed within a reasonable time. So, where, on the sale of lands, the conditions of

sale specified no particular time within which a good title should be made out, a declaration, in an action by the purchaser to recover back the deposit, was held bad for not averring that a reasonable time for deducing a good title had elapsed before the commencement of the action: *Sansom v. Rhodes* (a). But further, the plaintiff, by the form of his declaration, has made it a material allegation that the costs were taxed in a reasonable time after the agreement. The breach is made to depend upon that fact.

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The defendants have, moreover, a right to contend, in answer to this application, that they are not personally liable in this action. This is a contract by them merely as overseers, representing the township generally. The agreement is signed by them as overseers. It has reference to a subject-matter to which the parochial funds might be legally applied. That they contracted merely as the overseers for the time being is apparent from that clause of the agreement, by which, in case the arbitrators cannot agree, the appeals are to go on at the ensuing October sessions, which would be within the defendants' year of office. And the costs are by the agreement to be paid not by the defendants personally, but "by the overseers of the said township."

Again, the costs are only to be paid *when taxed*, i. e. in the same manner as an ordinary attorney's bill. No authority is by the agreement given to the clerk of the peace to tax them.

[They contended also, that, even if the second issue were held to be an immaterial one, the plaintiff would not be entitled to judgment non obstante veredicto, but a repleader ought to be awarded; and referred to *Plummer v. Lee* (b), and the judgments of *Bosanquet, J.*, and *Patterson, J.*, in the House of Lords, in *Gwynne v. Burnell* (c).]

(a) 6 Bing. N. C. 261; 8 Scott, 544.

(b) 2 M. & W. 500.

(c) 6 Bing. N. C. 453; 1 Scott, N. R. 711.

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As to the other point, the question of reasonable time was clearly for the jury, on the express traverse by which it was referred to them.

E. V. Williams, contra.—With respect to the point as to a replender, the case of *Plummer v. Lee* was expressly overruled in *Negelen v. Mitchell* (a), in which it was laid down, that where there are several pleas on the record, if one of them traverse immaterial matter in the declaration, and the defendant has pleaded other material matters which have been disposed of on proper issues, the Court will not grant a replender.

The second issue is an immaterial one. On this motion, the record only can be looked to for the application of this agreement. Can it be said the declaration would have been bad without the allegation that the taxation was in reasonable time? In the case of an agreement to refer a cause to an arbitrator, the costs to abide the event of the award and to be taxed, would it be necessary to aver, in an action on the award, that they were taxed in a reasonable time? Clearly not. Before the New Rules, would the plaintiff have been nonsuited, on non assumpsit, for not having proved that the taxation was in a reasonable time? The answer would be, that it was not so stipulated. In actions on promissory notes made payable at a certain time after demand, the objection was never taken that the demand was not made within a reasonable time; but the Statute of Limitations runs only from the date of the demand, whenever made: *Thorpe v. Booth* (b). So, a promissory note payable on demand is current for any length of time: *Brooks v. Mitchell* (c). Here the term as to the taxation of the costs is introduced for the defendants' bene-

(a) 7 M. & W. 612.

D. & R. 347.

(b) Ry. & M., N. P. C. 388;

(c) 9 M. & W. 15.

S. C. nom. *Thorpe v. Coombe*, 8

fit; yet they seek to use it as a condition precedent against the plaintiff, that it shall be within a reasonable time. They have expressly agreed to pay the costs *when taxed* by the proper officer. No doubt, in many cases, the law will intend that certain terms of a contract shall be performed in a reasonable time; but that is where the act is to be performed by one party for the benefit of the other, and the reasonable time is an incident in the benefit for which the other party contracted. But no such case is to be found, where the term is introduced for the benefit of the party who seeks to introduce the condition. Where no time is limited within which an act is to be done for the benefit of a person, it shall be done at his will; and the law will presume that he will do it in due time: Com. Dig., Condition, (G. 3); *Reniger v. Foyassa* (a). Would it be any answer to an action for the nonpayment of money payable on request, to say that the request was not made in a reasonable time? [Lord Abinger, C. B.—This case is put upon the ground that these are parish officers, who for a limited period only could charge the parish with these costs.] A different rule cannot prevail, because the defendants stand in a peculiar character. In a contract by an executor, would it be implied that he was to pay within the year? [Lord Abinger, C. B.—Even if this be a personal contract, it is a contract that *the overseers* shall pay; that is, the overseers for the time being; and if so, the declaration would seem to be bad for not averring that the overseers for the time being had been required to pay, and had not paid.] The defendants engage absolutely to pay, and the declaration alleges that the money remains unpaid. That is a sufficient breach, at all events after verdict. It does not appear on the face of the declaration when the contract was made, because the date is laid under a *videlicet*. It might have been the day before the defendants went out of office. However that be,

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the inconvenience of not enforcing such a demand immediately is no reason, in point of law, for implying such a condition as is here contended for.

But, in the next place, the question of reasonable time was for the Judge to decide, and not for the jury. [Lord Abinger, C. B.—If it was a material question, and if it was for the Judge, yet, if we are of opinion that the taxation was not in fact within a reasonable time, this part of your application must fail: and we think it was reasonable that it should be done within the year of office. We think the question was for the jury on the traverse; but that, if it was for the Judge, it was rightly determined.]

Lord ABINGER, C. B.—I am of opinion that this rule ought to be discharged. The question turns on the point, whether the averment in the declaration, that the plaintiff's costs were taxed in a reasonable time after the making of the agreement, on which the defendants have taken issue, is an immaterial averment, or not: If the contract bound the defendants personally to pay, or *while they were overseers*, then I think the issue is not an immaterial one; because it appears to me to follow that they were to pay while they had an opportunity of reimbursing themselves, and therefore it was reasonable that the costs should be taxed while they remained in office as overseers. It appears to me that that is a reasonable implication, and therefore that the traverse is correct; and the pleader who drew the declaration must so have thought.

There is, however, another point of view in which the traverse is immaterial; *i. e.* supposing the import of the agreement to be not that the defendants shall pay out of their own pockets, or merely while they are overseers, but to amount to a guarantie that the overseers for the time being shall pay; and I am inclined to think that such was the meaning of the contract. But if that be so, I am strongly disposed to think that the declaration is bad, for the reason I

have already stated, that it does not allege a demand on, and nonpayment by, the overseers for the time being. Mr. *Williams* has given an ingenious answer to this objection, namely, that there is an averment that the money remains unpaid. But that is connected with the previous allegation of a request to the defendants to pay. If the overseers for the time being had no notice, I do not see how the defendants have broken their contract by the mere fact of the money remaining unpaid to the plaintiff. In an action on an ordinary guarantie, the plaintiff cannot recover without alleging and proving that the principal has been called on to pay and has not paid. And if the declaration is bad, although the traverse be immaterial, the plaintiff cannot have judgment non obstante veredicto. On the other hand, if the defendants were liable themselves to pay, then I think the traverse was material, and that the jury have rightly found that the costs were not taxed in a reasonable time.

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GURNEY, B., concurred.

ROLFE, B.—I am of the same opinion, although I have had considerable doubt in the course of the argument. If this were merely a contract between A. and B., as Mr. *Williams* puts it, the traverse would certainly be an immaterial one, because a party is not limited in point of time as to an act which he is to do for his own benefit. But this is not merely an act to be done for the benefit of the plaintiff, because the costs are to be paid by the defendants out of a given fund, over which they would cease to have any control by a given day. I think, therefore, the issue was not immaterial, and that the rule ought to be discharged.

Rule discharged.

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June 14.

KINGTON v. GROOM.

After verdict in a cause tried before the sheriff under a writ of trial, the Court will not entertain an objection which was not made at the trial, that the jury was wrongly summoned, and was composed of persons who were not on the jury list for the county.

THIS was an action of debt, tried before the under-sheriff of the county of Northampton, under a writ of trial. The defendant appeared, and called evidence in support of an alleged set-off; but there was a verdict for the plaintiff.

Hayes now moved for a new trial, on the ground (amongst others) that the jury were wrongly summoned. The sheriff was directed by the writ of trial to summon a jury from the body of the county, whereas the jurors who tried the cause were all persons residing in the town of Northampton, with the exception of two, who, however, were not on the jury list for the county, nor qualified to be so. [Lord *Abinger*, C. B.—Was this objection made at the trial?] No; the irregularity was not then discovered. *Farmer v. Mountfort* (a) shews that this was a mis-trial. [Lord *Abinger*, C. B.—The defendant ought to have challenged the jurors.] It is very doubtful whether there can be any challenge on the trial of a cause under a writ of trial: *Pryme v. Titchmarsh* (b). In that case the defendant was held to be precluded from availing himself of this objection, on the ground that his attorney had, before the trial, looked over the list of the jurors and expressed himself satisfied with it. Here there was no such acquiescence, and no discovery of the irregularity until after the trial. [Lord *Abinger*, C. B.—The party had the means of discovering it at the trial.] That must be admitted.

Lord *ABINGER*, C. B.—I think the party ought to take such an objection as this at the trial, and not to be allowed to lie by and take his chance of a verdict. If the objection

(a) 8 M. & W. 266.

(b) 10 M. & W. 605.

had been made then, the sheriff might have dismissed the jury and summoned a fresh one.

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1843.

KINGTON
v.
GROOM.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

POOLE v. HUSKINSON (a).

TRESPASS for breaking to pieces certain gates and posts of the plaintiff, and taking and carrying away the materials thereof. Pleas—first, not guilty; secondly, as to breaking &c. one gate, and taking and carrying away the materials thereof, a justification under a right of public way, claimed generally for all the liege subjects &c., on foot, and with cattle and carriages; thirdly, a justification under a right of private carriage-way for the defendant, as the occupier of a messuage and land in the parish of East Bridgeford, in the county of Nottingham, alleging an enjoyment thereof as of right and without interruption for 20 years next before the commencement of the action. To the second plea the plaintiff replied, traversing the right of way as therein alleged; and new assigned also, that the defendant committed the trespasses in a greater degree, &c. than was necessary for using the way, and for other and different purposes, &c. There was a similar new assignment to the third plea. The defendant took issue on the replication, and, after relinquishing so much of the plea of not guilty as applied to the trespasses newly assigned, pleaded payment into Court of 10*s.* as to these trespasses, which the plaintiff accepted in satisfaction thereof.

There may be a dedication of a way to the public for a limited purpose, as for a footway, &c.; but there cannot be a dedication to a limited part of the public, as to a parish. And such a partial dedication is simply void, and will not operate in law as a dedication to the whole public.

In order to constitute a dedication of a way to the public by the owner of the soil, there must be an intention so to dedicate, of which the user by the public is evidence, subject to be rebutted by contrary evidence of interruption by the owner.

At the trial, before *Patteson, J.*, at the Summer Assizes for the county of Northampton, 1842, it appeared that this was an action brought by the plaintiff, who was the surveyor of the highways of the parish of East Bridgeford, in the county of Nottingham, for a trespass committed by the

(a) This case was decided in last Hilary Term, (Jan. 19), but was unavoidably postponed.

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defendant, a farmer in the same parish, in the user of an alleged public carriage-way, called Mill Close Lane, communicating with the Newark turnpike-road. The learned Judge ruled, after argument, that, upon these pleadings, the defendant was entitled to begin; and he accordingly called a great body of evidence to shew that the road in dispute (which by an award of certain commissioners under an act of Parliament for inclosing lands in the parish of East Bridgeford, made in the year 1801, was set out as a public bridle and drift, and *private carriage-road*, to be repaired by the owners of the adjoining lands) had been, since the award, used generally by the public; from which it was sought to infer a dedication of it to the public by the owner of the soil, whoever he might be. On the part of the plaintiff, it was alleged that this user had taken place, partly without the knowledge of the parties interested in retaining the road as a private carriage-road, and more recently under protest; that, since the date of the award, many persons had been turned back who had attempted to use it; that, at various times, notice-boards had also been affixed in the lane, (by whom it did not appear), cautioning persons against using it as a public carriage-road; and that, within the last twenty years, a gate had stood across it in the same situation as that which the plaintiff had put up and which was broken down by the defendant, and so continued for several years. It appeared, however, that a notion had existed that, under the award, all the parishioners of East Bridgeford had acquired a right to use the road, and some of them had accordingly remonstrated on several occasions with other persons, not parishioners, for using it. In the course of his summing up, the learned Judge stated to the jury, that it did not appear to whom the soil belonged; probably to the lord of the manor; but that, to whomsoever it belonged, the use of it by the public generally would be evidence of a dedication; and that a dedication to the inhabitants of the parish, and persons resorting to their houses, would be in effect a dedication to

the public at large. The jury having found a verdict for the defendant, *Exch. of Pleas, 1843.*

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Whitehurst, in the following Michaelmas Term, obtained a rule nisi for a new trial, on two grounds: first, that the plaintiff ought to have been allowed to begin at the trial; and, secondly, that the learned Judge had misdirected the jury as to the effect of a partial dedication. Against this rule, in last Hilary Term, (Jan. 19),

Hill shewed cause.—The case was properly left to the jury by the learned Judge, and the verdict is in accordance with the weight of the evidence. The continued user by the public of a carriage-road over the locus in quo, since the award, is abundantly sufficient to raise a presumption of the dedication to the public of such a road by the owner of the soil, whoever he might have been. [Lord *Abinger*, C. B.—The objection is to that part of the summing up of the learned Judge in which he said that there would be a dedication to the public, if the owner intended to dedicate to a particular part of the public, as the inhabitants of a parish. It is quite correct to say that the owner cannot make a valid dedication to a part of the public; but is the consequence that which the learned Judge stated, namely, that it became a dedication to the public? In that the direction appears to be incorrect.] It must be admitted that that was erroneous. But this part of the summing up was quite immaterial, and the jury could not have been misled by it.

Whitehurst, (with whom was *Waddington*), in support of the rule.—It was very material. The jury went out, and returned to ask the opinion of the learned Judge whether there had been a dedication; and he told them that they were to decide upon the fact, not himself; but if they thought the owner intended to give the use of the road to the inhabitants of the parish, it would amount to a dedication of the road to the public.

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LORD ABINGER, C. B.—The direction may have had a great influence on the minds of the jury, and there must be a new trial. The user by the public with carriages, since the award, is no doubt evidence of a dedication by the owner to the public; and the notices which were fixed on posts, and which may be presumed to have been done with the consent of the owner of the soil, are strong evidence to the contrary. The interruptions also by the overseers, who had the herbage, are very material in the case.

PARKE, B.—I agree with my Lord. There may be a dedication to the public for a limited purpose, as for a footway, horse-way, or drift-way; but there cannot be a dedication to a limited part of the public. In that respect the direction of the learned Judge was quite correct; not so the alternative, that, as such a partial dedication was invalid in law, it would nevertheless operate, against the intention of the owner of the soil, in favour of the whole public. I think it would be merely void. In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an *intention* to dedicate—there must be an *animus dedicandi*, of which the user by the public is *evidence*, and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment. As to the ownership of the soil, I do not apprehend that there is any difficulty. It remains in the lord of the manor, for that portion of the soil only is taken from him for which he receives compensation, and which is allotted to others.

ALDERSON, B., and GURNEY, B., concurred.

Rule absolute (a).

(a) The cause was tried again at the Summer Assizes, 1842, before Alderson, B., who ruled that

the plaintiff was entitled to begin, and he obtained the verdict.

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1843.VACATION SITTINGS AFTER TRINITY
TERM.MORSE and Another, Assignees of ROGERS, a Bank-
rupt, v. JAMES.

June 21.

ASSUMPSIT for £20, upon a promissory note indorsed by the defendant to the bankrupt; and in £50, for goods before then sold and delivered by the bankrupt to the defendant at his request, and for money before then lent by the bankrupt to the defendant at his request; and in £50 upon an account stated between the bankrupt and the defendant, averring a promise by the defendant to the bankrupt to pay him the said several monies respectively on request. First plea, as to the said several sums of money in the *last three counts mentioned*, except as to 12l. 5s., parcel thereof, non assumpsit. Special demurrer to such plea, so far as the same related to the said sum of money and cause of action in the first count mentioned, as being contrary to the pleading rules of H. T., 4 Will. 4, tit. Assumpsit. Joinder, "that, inasmuch as the said first plea doth not in any way relate or refer to the said sum of money or cause of action in the first count mentioned, the same is sufficient in law."

A count for £50, for goods sold and for money lent, is only *one* count, stating two considerations.

Cole, in support of the demurrer.—This declaration contains only three counts, and the plea expressly applies to all three counts. The second count merely alleges several considerations for one debt or sum of £50, which is in accordance with established precedents: *Webber v. Tivill* (a). In note (2) to that case by Mr. Serjeant Williams, it is said, "The common counts in a declaration may

(a) 2 Saund. 121.

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be contained in one count, stating that the defendant was indebted to the plaintiff in a given sum, large enough to comprehend all the money which the plaintiff can possibly recover, in £1000 for instance, as well for goods sold and delivered, &c., as for money lent and advanced," &c. This was recognized as law in *Galway v. Rose* (a); *Parke, J.*, there says, "According to the old form given in Saunders' Reports, there might be several different considerations included in one count in *indebitatus assumpsit*." Had several debts been alleged, the statement of each debt might be considered as amounting to a several count, within the meaning of the rule which forbids the use of several counts; but here only one debt or sum of £50 is alleged to be due in respect of the goods sold and money lent.

Whateley, *contra*.—The plea only applies to the three counts *last* mentioned; it was not intended to extend to the first count. The next count is a double one, and must be considered as amounting for this purpose to two several counts, viz. one for goods sold, and another for money lent. The declaration concludes by alleging a promise to pay "the said several monies respectively." Therefore each cause of action constitutes a distinct count: *Jourdain v. Johnson* (b).

PARKE, B.—In *Jourdain v. Johnson* the sum was repeated. Here one sum of £50 only is stated as being due in respect of the goods sold and the money lent. The authorities cited clearly shew that that is only one count. The plea expressly applies to three counts, and the word *three* cannot be rejected.

GURNEY, B., and ROLFE, B., concurred.

Leave to amend within a week, on the usual terms;
otherwise

Judgment for the plaintiffs.

(a) 6 M. & W. 291.

(b) 2 Cr. M. & R. 564.

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BOWMAN and Others, Assignees of Eastwood, a Bankrupt, v. MALCOLM.

June 21.

TROVER to recover the value of thirty-six bags of wool.—The declaration alleged the possession by the plaintiffs, as assignees of Samuel Eastwood, a bankrupt, and a subsequent conversion by the defendants. Pleas: first, not guilty; secondly, that the plaintiffs were not assignees of Eastwood; thirdly, a denial of the plaintiffs' possession as assignees. At the trial, before Lord *Denman*, C. J., at the York Summer Assizes for 1842, a verdict was entered for the plaintiffs on the first and third issues, the verdict on the latter issue to be subject to the opinion of the Court on the following case:—

S. Eastwood, before his bankruptcy, was a woolstapler at Huddersfield, and the defendant was a wharfinger and shipping agent at Hull.

Previously to the bankruptcy, wools purchased by or for Eastwood were, by his directions, frequently consigned to the defendant at Hull, and by him unloaded into boats,

S., a woolstapler at Huddersfield was in the habit of making purchases of wool, which he directed to be consigned to the defendant, a wharfinger and shipping agent at Hull, who forwarded them to him at Huddersfield, by carrier. In July 1841, S. purchased certain wool in Scotland, which was paid for by E., his agent there, and by him forwarded to the defendant at Hull. Part of this wool, consisting of ten bags, arrived at Hull on the 27th of

September, and a portion of it was, at ten o'clock on that morning, taken possession of by the defendant, the remainder being taken possession of by him between ten o'clock and four. E. received from S., in repayment of the advances made by him for the purchase of the wool in question, acceptances of S., which were running at the time of S.'s bankruptcy, and were afterwards dishonoured. On the 21st of September, E. received a letter from S., in which he informed him of his insolvency, and directed him to get the wool, and do the best he could to save himself. Accordingly, on some day between the 26th of September and the 1st of October, E. gave directions to the defendant to seize the wool. The remaining portion of the wool arrived at Hull on the 3rd of October, and was delivered into the defendant's warehouse on the 6th, 7th, and 8th of that month. An act of bankruptcy was committed by S. on the 22nd of September; the fiat was dated and issued on the 27th, and was signed between twelve o'clock and two o'clock on that day, but it did not appear at what hour it was delivered out. The defendant, who claimed to retain the wool in satisfaction of a general balance, had been in the habit of sending to the bankrupt, by the carrier, together with the goods, printed delivery orders, which stated that all goods were considered as general lien, subject not only to freight, but also to the balance of any former account due from the owners or consignors. These orders had been seen more than once in the bankrupt's hands, and on one occasion the weights therein stated had been altered by him.

Held, in an action of trover by the assignees of S. to recover the value of the thirty-six bags of wool, first, that E. had no right to the goods, in respect of which the defendant could retain them; secondly, that the defendant had not established any right of general lien, by virtue of which he could retain any part of the goods.

Semble, (per *Parke, B.*), the stat. 2 & 3 Vict. c. 29, operates to protect a claim of general lien on goods of a bankrupt coming into the hands of the party before the fiat, without notice of an act of bankruptcy.

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and forwarded direct to Eastwood, at Huddersfield, pursuant to the orders of the consignors, unless Eastwood ordered them to be warehoused at Hull.

In July, 1841, the bankrupt purchased the wool in question in Scotland, and it was paid for, except to the amount of between £30 and £40, which remains unpaid, by one G. Elder, who was the bankrupt's agent in Scotland, and accompanied him when he purchased the greater part of the wool in question. Elder and the bankrupt had many transactions together, to a large amount, in buying of wool, and afterwards paying for and forwarding it to the bankrupt; to meet such payments, the bankrupt remitted bills of exchange to Elder, who discounted such bills at the banks in Scotland on his own indorsement, and paid for the wool purchased. Elder advanced monies to pay for the wool in question, and afterwards received from the bankrupt bills of exchange, which, however, were dishonoured after the bankruptcy, the holder of them being a creditor of the bankrupt's estate for the amount. The wool in question, consisting of thirty-six bags, was packed, under the superintendence of the bankrupt and Elder, in sheets of the bankrupts, marked S. E., and sent by the respective vendors to Messrs. Wisharts, of Leith, who were shipping agents there, and by them forwarded to the defendant, with orders to forward them to the bankrupt. Messrs. Wisharts had been employed by the bankrupt on former occasions to forward wools bought in Scotland to the bankrupt, through the defendant's house at Hull. The wools in question were delivered at Messrs. Wisharts in the month of September, and by them shipped on board *The Pegasus* and *The John Watson*, two vessels bound for Hull; ten bags were shipped on board *The Pegasus*, and twenty-six on board *The John Watson*, and both parcels were consigned to the defendant. *The Pegasus* went into dock at Hull at four o'clock on the morning of the 27th of September; and at seven o'clock on the same morning,

the defendant's porter came on board to receive the ten bags of wool, and part of them were taken by him from on board at ten o'clock on the same morning, and the rest were conveyed by him from the ship, between that hour and four o'clock on the afternoon on that day, to the defendant's warehouse at Hull. The John Watson arrived at Hull on the 3rd of October with the twenty-six bags on board, and they were delivered into the warehouse of the defendant on the 6th, 7th, and 8th of October.

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The dates, as regards the bankruptcy, were as follows:—The fiat was bespoken on the 24th of September, and was dated and issued on the 27th; and it was signed at some time between twelve at noon and two o'clock in the afternoon of that day; but it did not appear in evidence when it was delivered out. Fiats, when signed, are not delivered out till called for at the Bankrupt's Office, and sometimes remain there for a week without being called for. Acts of bankruptcy were proved at the trial to have taken place on the 20th and 21st of September, 1841. The act of bankruptcy on which the fiat issued consisted of an assignment of the bankrupt's estate, on the 22nd of September, 1841, to Liebrich, one of the plaintiffs, in trust for the benefit of the bankrupt's creditors. The plaintiffs put in an order of admission of "a notice dated the 27th of September, 1841, signed by the said Liebrich for himself and two other trustees, addressed to and served on the defendant on date;" but there was not in any other respect notice of Eastwood's bankruptcy, either to Elder or the defendant. Elder first heard in Scotland of Eastwood's insolvency on the 21st or 22nd of September, 1841, by a letter from the bankrupt, and by the same letter was desired by the bankrupt to get the goods in question, and do the best he could to save himself. The letter also gave him authority to keep the goods, if he could get hold of them; whereupon he went to Lejth, and finding the wool had been forwarded, he proceeded to Hull; and, on some

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he gave the defendant directions to stop the wool.

On the 19th of September, 1841, there was due from Eastwood to the defendant a general balance for the defendant's charges, of the sum of 192*l.* 10*s.* 8*d.*, which remains unpaid. It appeared, from the defendant's evidence before the Commissioners of Bankrupt, that shippers were in the habit of consigning goods to him, with orders to forward them to the bankrupt, which he generally did; that he very seldom warehoused the bankrupt's goods before forwarding them; that he claimed a lien on all wools then in his hands for his general account, by virtue of a printed form or delivery order, delivered by him with the goods to the agent of the vessel taking the goods from Hull; that, on all occasions of sending wool to the bankrupt, he delivered such printed form to a Mr. Marsden, the agent of the carriers from Hull to Huddersfield. The warehouse and wharf adjoin each other, but the wools in question were all put on the wharf, and thence taken into the warehouse. No charge was made by him, as wharfinger, for placing the goods on the wharf, unless they lay in the warehouse some time, when he charged rent as a warehouse-keeper. The following is a copy of the notice contained in the printed form or delivery order:—"All charges are expected to be paid on or before the delivery of the goods, and all goods are considered as general lien, subject not only to the freight thereon, but also to the balance of any former account due from the owner or consignors." Delivery orders containing the above notice had more than once been seen in the bankrupt's possession long before the bankruptcy; and on one occasion the bankrupt had, in his own handwriting, made an alteration in the weights therein stated. Beyond the 192*l.* 10*s.* 8*d.*, a further sum was due to the defendant for charges on the particular wools in question. Before the action, a larger sum was tendered by the assignees to the defendant than

was sufficient to cover any charges to which he was entitled in respect of the particular wools in question. There was at the same time a demand and refusal of the goods.

The Court is to draw such inferences from the above facts as might be thought reasonable.

The question for the opinion of the Court is, whether the plaintiffs are in this action entitled to recover the value of the wool in question, or any part of it.

If this Court should be of opinion that they are so entitled to recover the value of all the wool in question, then the verdict on the third issue is to stand for the plaintiffs, and the damages to be 430*l.* 11*s.* 2*d.* If they should be of opinion that they are not so entitled to recover any part, then the verdict is to be entered on that issue for the defendant; and if they should be of opinion that the plaintiffs are entitled to recover in respect of the ten bags only, or of the twenty-six bags only, then the amount of the verdict is to be reduced in proportion.

Cleasby, for the plaintiffs.—The plaintiffs are entitled to recover the value of the whole thirty-six bags of wool. It is clear that the property in the whole was vested in the bankrupt by the contract of sale before the bankruptcy and nothing subsequently occurred to divest it out of him, or to give any other person a right to hold it as against him. But it is said that the defendant has a right to retain the goods, either for his general lien—which, however, he could not do without *possession*—or by reason of a right in Elder, in the nature of a right of stoppage in transitu, which it is said he has exercised, so as to prevent the assignees from claiming the goods. But Elder has no such right. The fact of his paying for the wool as agent for the defendant could give him no right whatever. He is not in the situation of an unpaid vendor. [*Parke*, B.—Besides, his advances were repaid by other bills of the bankrupt, which were running at the time of the bank-

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ruptcy, and therefore *prima facie* amounted to payment.] That is so. It is said, however, that Elder had such right under the bankrupt's letter to him of the 21st or 22nd of September, in which he desired him to get the goods, and do the best he could to save himself. But a mere authority of that kind, by a communication thus voluntarily made, could not re-vest the property; besides, it was written, and probably received by Elder, after an act of bankruptcy committed. It could then have no effect to give any rights as against the other creditors. If the property in the goods had been transferred by such an act, it would have been in itself an act of bankruptcy. [*Parke, B.*—Even if it could be said to operate as an assignment, before Elder got possession of the goods, there is strong evidence to shew that it was fraudulent, as being in contemplation of bankruptcy, and so to avoid it. If, on the other hand, it operated as an assignment only from the time of the actual seizure of the goods by Elder, there is no evidence when that was.] But, further, it does not amount to an *assignment* at all; it is a mere *authority* to the party to get possession if he can.

Next, supposing the defendant to have a lien for wharfage, at all events he could have no general lien as to those twenty-six bags which came into his possession after the fiat, because they were not then the bankrupt's goods. Neither has he any such claim as to the other ten. It may be admitted that a wharfinger has a general lien for wharfage: *Mucklow v. Mangles* (a). But this is the case of goods which came into the possession of the defendant after the bankruptcy and before the fiat, and it is submitted that such a transaction is not within the stat. 2 & 3 Vict. c. 29, and that that statute would not operate to give the defendant the right for which he contends. Before that act it is clear he could not claim it, by reason of

(a) 1 Taunt. 218.

the doctrine of relation; not even in the case of a specific lien, *Copland v. Stein* (a), *Hovill v. Lethwaite* (b). Then the words of the statute are, that "all contracts, dealings, and transactions, by and with any bankrupt, really and bonâ fide made and entered into before the date and issuing of the fiat, shall be deemed to be valid," &c., not without any prior act of bankruptcy. And the question is, does this enactment make any difference in the law, in the case of a general lien? Its words, no doubt, would include the case of a specific lien for the charges on the particular goods, because that exists by the actual contract between the parties; but it was only intended to protect *actual dealings*, which confer specific and actual rights. [*Parke, B.*—The claim of a general lien does confer an actual right; the goods remain pledged for the whole balance.] But the parties enter into no new contract, and create no new consideration for that debt. The statute was intended to protect the dealing or contract itself. [*Rolfe, B.*—Is not each particular receipt of goods subject to a general lien, the same for this purpose as if there were a lien by actual agreement in each particular case?] General liens are not favoured by the law, and are therefore not to be construed as being within an act of Parliament, except by clear words. When a party incurs charges in respect of particular goods, that is a part of the dealing itself; but the option to exercise a general lien is no *dealing* or *transaction* made and entered into between the parties. In *Turquand v. Vanderplank* (c), *Alderson, B.*, expressed an opinion that a payment by the bankrupt was not a dealing or transaction within the act. The intention of the legislature was, that, in their actual dealings inter se, the parties should be protected if they had no notice of the act of bankruptcy.

But, further, it does not sufficiently appear from the evidence that any of the goods were in the possession of

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(a) 8 T. R. 199.

(b) 5 Esp. 158.

(c) 10 M. & W. 180.

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the defendant before the issuing of the fiat. It appears that "part of them" were delivered to him before twelve o'clock on the 27th of September, but it is not shewn how much. [*Parke, B.*—The goods are found to have been in bags, therefore he must have taken one bag.] Again, it does not satisfactorily appear, from the facts stated, that the defendant was entitled to any general lien, either from the nature of his charges, or by actual contract. It is rested on two grounds: first, his being a wharfinger; and, secondly, the supposed contract arising out of the notice contained in the delivery order. Now the former cannot give him a general lien for matters not connected with his trade of a wharfinger. As to the bankrupt he was a shipping agent, his practice being merely to transship and forward the goods, unless he had special orders to the contrary. His claim is not for *wharfage*, properly so called. And the notice in the delivery order is of too vague a nature to create a general lien in favour of the defendant: besides, the custody of it was not in the bankrupt, but in Marsden; although it certainly appeared that on some occasions such delivery orders had come into the bankrupt's possession, but for a particular purpose, and almost accidentally as it were, long before the bankruptcy. It must operate as a contract by being supposed to be a document which the party is interested in, and therefore reads; whereas this is Marsden's document, who had claims for freight against the defendant. The proper place for a claim of a general lien is in the debtor and creditor accounts between the parties. The carriers take the goods from the defendant, and this is *their* authority; it is *they* who say they will not deliver the goods without payment of charges, and of the general balance of account. The bankrupt would construe it as a notice from Marsden, not from the defendant.

J. Henderson, contra.—First, the plaintiffs are not en-

titled to the possession of any of these goods. A valid transaction had been entered into between the bankrupt and Elder, for a sufficient consideration, before the fiat, which entitled Elder to get possession of and retain the goods. The party who agreed to *buy* them authorized the party who had agreed to *pay for* them to keep them, in order to secure himself. This being done without fraud, upon a good precedent consideration, and before the rights of third parties had intervened, the assignees under the subsequent fiat could not entitle themselves to the possession of the goods without payment of Elder's debt. *Atkin v. Barwick* (a). In *Salle v. Field* (b), it was held, that the property in goods, bought by an agent for the vendee, and delivered by him to the vendee's packer, in whose hands they were attached by the vendee's creditors, re-vested in the vendor, so as to avoid the attachment, by the vendee's having countermanded the purchase by a letter to his agent, dated before such delivery, though not received by the agent until afterwards, the vendor assenting to take back the goods. *Bartram v. Farebrother* (c), *Bailey v. Culverwell* (d), and *Feize v. Wray* (e) are additional authorities to illustrate the principle which governs the present case; namely, that where, without fraud, and before such receipt of the goods by the vendee as would prevent a stoppage in transitu, he countermands the delivery to him, and the other party assents thereto, that re-vests the property in the latter, and entitles him to retain the goods upon the bankruptcy of the vendee. And *Hawkes v. Dunn* (f) shews that an agent of a bankrupt vendee, who has made himself responsible for the price of goods, may stop them in transitu equally with an unpaid vendor. [Parke, B.—You say Elder is in the same situation as an

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(a) 1 Str. 165.

(b) 5 T. R. 211.

(c) 4 Bing. 579; 1 M. & P.
515.

(d) 8 B. & Cr. 448; 2 Man. &
R. 564.

(e) 3 East, 93.

(f) 1 C. & J. 519.

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unpaid vendor; but he is rather in the situation of a paid vendor; he has discounted the bills given for the price, and is paid by other bills which are running at the time of the bankruptcy.] He is paid by the bills of an insolvent, which are dishonoured, and for the amount of which he is liable. It was both legal and honest in the bankrupt to return the goods to the person who had paid for them. [*Parke, B.*—This is not a case in which the agent has purchased the goods on his own credit; the utmost is, that Elder lent the bankrupt money to pay for them, and the bankrupt gave him bills for the money. Elder had no interest at all in the goods.] The transaction amounts to this—the bankrupt says, “I have sent you bills worth nothing; take possession of the goods and pay yourself.” There is nothing to shew that it was in the nature of a fraudulent preference. The effect of it was to invest Elder with a right to take the goods for his own security, to which he assented. [*Parke, B.*—If it operated as a present assignment, it is a fraud on the bankrupt law, and if not, then he had no possession before the bankruptcy.] The possession of a part of the goods was in law a taking possession of the whole; the defendant had a dominion over the cargo as soon as he took possession of a part. [*Parke, B.*—Not so: this is no question of stoppage in transitu, but whether the defendant had possession, so that his general lien will attach. Could not the shipowner require payment of the freight, and insist upon his lien as to each bag until it was over the ship’s side? The only question is, whether the defendant has any general lien.] The printed notice shews the terms on which the bankrupt and the defendant had dealt in this respect long before the bankruptcy, and is sufficient to establish the claim of lien. The defendant thereby gives notice, that he does not part with the goods until his charges are paid. [*Parke, B.*—He does part with them, and at the same time gives notice that he will not part with them till his charges are paid.] He declares

thereby what are his terms of business, and it is shewn that the bankrupt knew them. It is the same as if it had been said in the bankrupt's presence, that such were the terms of his dealing. If then a general lien be established, it follows, by legal construction, that on every deposit of goods there is a renewed contract for a particular lien. The receipt of the goods is a *dealing*, and a *transaction*: it creates also a *contract* for the lien.

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Cleasby, in reply, was desired by the Court to confine himself to the latter question, as to the defendant's lien.—The notice is rather to be considered as a notice from Marsden to the bankrupt. It is an authority to Marsden to deliver to the bankrupt, defining the terms of such delivery. The carriers are the persons to receive the freight; none could be due to the defendant. It is in effect a notice from Marsden of the terms on which he undertakes to carry and deliver. If it be an authority to the warehouse-keeper, it ought to be in his hands.

PARKE, B.—I am of opinion that the plaintiffs are entitled to recover the value of the whole of these goods. There is no doubt that they were the property of the bankrupt at the time of the bankruptcy. Then Elder has no title to them; because he was not originally the purchaser, but only advanced money to the bankrupt to pay for them, whereby he acquired no lien or title. Nor could he acquire any by what occurred afterwards—by a letter written, we know not whether before or after the bankruptcy, or whether with or without notice. In order to bring himself within the protection of the Bankrupt Act, he ought to shew when the authority was given, and that he had no notice of the bankruptcy: *Pearson v. Graham (a)*. But, passing by that objection, even if the letter of the bankrupt could be held to amount to an assignment of the

(a) 6 Ad. & E. 899; 2 Nev. & P. 636.

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goods to Elder, it is a fraudulent preference of a particular creditor, for Elder merely stood in the relation of a creditor for the money he had advanced to the bankrupt, and had no title to the specific goods. Besides, it appears that he had been paid by bills, which were running at the time of the bankruptcy. The real meaning of the letter is merely this—"I am insolvent, and you may get the goods if you can." At all events, Elder had no title under it until actual seizure, and no seizure is shewn to have been made before the fiat. In every way, therefore, the title of Elder is out of the case, and the plaintiffs are entitled to recover, unless the defendant can bring himself within the stat. 2 & 3 Vict. c. 29. [His Lordship read the words of that act.] He must therefore shew, that the transaction occurred before the date and issuing of the fiat, that is to say, that he had a title before twelve o'clock on the 27th of September. Now it appears that he possessed himself of part of the goods at ten o'clock on that day, but of how much is left in uncertainty; and as it is for him to shew how much, he is entitled to one bag only, supposing he has shewn himself entitled to any. But it does not appear that any part of his claim is for *wharfage*. As a shipping agent, or warehouse-keeper, he could have no general lien unless by contract. He is therefore to shew, that, by contract either express or implied, he was entitled, before twelve o'clock on the 27th of September, to a general lien. I certainly am strongly disposed to think, that, if he shewed that by good evidence, the case is within the act of Parliament: it seems to me that it applies to all contracts, either express or implied, made between the parties. But we are to say whether the defendant has shewn in point of fact that he had such a lien, either by the usage of trade or by contract. There is no evidence of usage; the question depends, therefore, on the construction of the printed notice; and that is left in such obscurity, that I cannot say I am satisfied that the defendant has thereby established his claim. The ques-

tion exists only as to one bag; and I cannot say there is satisfactory evidence of a claim of lien as to that. We cannot tell for what purpose the notice was made out, or delivered to the carrier.

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GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiffs.

BECK v. BEVERLY.

June 23.

ASSUMPSIT on a bill of exchange for £10, dated 14th February, 1840, drawn by one James Appleton on and accepted by the defendant, payable six weeks after date to the order of Appleton, indorsed by him to H. Lindus, and by him to the plaintiff. Plea, that the said bill of exchange was made and drawn by the said J. Appleton upon and accepted by the defendant, in respect of a debt or sum of money due from the defendant to the said J. Appleton before the time of his, the defendant's, discharge from prison by the Court for the Relief of Insolvent Debtors in England, as thereafter mentioned, whereof the plaintiff, before and at the time when the said H. Lindus indorsed the said bill of exchange to him, had notice; and that the defendant afterwards, and after the accepting of the said bill of exchange, to wit, on the 3rd day of March, 1841, by an order made by the Court for the Relief of Insolvent Debtors in England, held at the city of Durham, he, the defendant, being then an insolvent debtor in custody, and a prisoner in the county gaol of Durham aforesaid, was duly discharged according to a certain act of Parliament made and passed in the second year of our sovereign lady the now Queen, intituled, among other things, "An Act for amending the Laws for the

In reciting a statute in pleading, the whole of its title must be stated, though it comprise several other subject-matters besides that to which the pleading relates.

The discharge of an insolvent debtor from a debt in respect of which he has accepted a bill of exchange is no discharge as to the bill in the hands of a third person, unless the holder's name be inserted in the schedule, or it be stated therein that he is unknown, pursuant to the stat. 1 & 2 Vict. c. 110, s. 75.

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Relief of Insolvent Debtors in England," of and from the said debt in respect whereof the said bill of exchange was so accepted by him as aforesaid, and that the aforesaid discharge still remains in full force and effect.—Verification.

Special demurrer, on the following grounds:—That it does not appear by the plea that the defendant was by the said order discharged from the bill of exchange in the declaration mentioned, or from the causes of action in respect thereof, or from the monies due thereon; and although he may have been discharged from the debt in respect whereof the bill of exchange was accepted, it does not follow that he was also discharged from the bill of exchange: that it does not appear by the plea that the defendant was discharged by the order of adjudication made in that behalf; that there is no such act of Parliament as in the plea supposed, and which is intitled as therein mentioned; that it does not appear that the defendant was a prisoner in actual custody within the walls of a prison on process for debt, or that he petitioned the said Court for his discharge from such custody, or filed any schedule in the said Court according to the statute, or described therein the holder of the said bill of exchange, or set forth the bill; and that, although the plea is pleaded in bar of the whole action, it does not appear thereby that the said order was made, or that the defendant was discharged, before the commencement of this suit.—Joinder in demurrer.

Humfrey, in support of the demurrer.—This plea is clearly bad. First, the defendant is not discharged from the bill of exchange (although he may be from the debt in respect of which it was accepted) unless it was inserted in his schedule, and there was notice to the holder, or an allegation that the holder was not known. Secondly, the plea does not state that he was discharged before the commencement of this action. Thirdly, it does not state in express terms that he was discharged by the order of

adjudication according to the stat. 1 & 2 Vict. c. 110, s. 75. Fourthly, that statute is not properly recited in the plea. Its title is not, as there stated, "*among other things*, an Act for the Relief of Insolvent Debtors in England;" but its other objects are stated fully in the title. Besides, it ought to have been alleged to have been passed, not in the second year of the Queen's reign, but "in the session of Parliament holden in the first and second years" of her reign: *Rex v. Biers* (a).

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Ings, contra.—With respect to the last objection, the statute is properly described as having been passed in the second year of the Queen's reign. *Rex v. Biers* is distinguishable, because there the statute was pleaded as having been passed "in the second and third years" of the reign, which could not be. It is a statute from the time of its receiving the royal assent, which in this case was in the second year of the reign. *Nutt v. Stedman* (b). Secondly, the title of the act is properly recited. Its title is three-fold, and is to be applied reddendo singula singulis. Each part of the title has relation to a different portion of the statute. [*Parke, B.*—But in pleading, you must recite the title altogether. Besides, the plea is bad in substance, because it is pleaded only that the defendant was discharged as to the original debt; that is no discharge as to the bill, in the hands of a different holder.] In *Boydell v. Champneys* (c), it was held that an insolvent debtor, who inserts in his schedule the name of the holder of a bill of exchange, on which he is liable, or gives such other description of it as ratifies the statute, is discharged as to *all* the parties to the bill, though not named in the schedule, and also as to the original debt for which he was a security. *Parke, B.*, there cited *Reeves v. Lambert* (d), in which it was

(a) 1 Ad. & E. 327; 3 Nev. & M. 475.

(b) Fortesc. 372.

(c) 2 M. & W. 433.

(d) 4 B. & Cr. 214.

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said by the Court, "Here the defendant has mentioned the original debt in his schedule, and he is discharged by force of the Insolvent Act as to that debt, and being discharged as to that debt, he is discharged from any claim arising by reason of a security given for that debt." And the learned Judge adds, "If the insolvent were not discharged as to the debt itself, it would be an exceedingly hard case upon him, because, as to debts secured by negotiable instruments, he would never be free from liability. [*Parke, B.*—That case applies where the bill is inserted in the schedule; here the defendant pleads that the original debt, not the bill of exchange, was inserted in the schedule. There the instrument was properly inserted in the schedule, and the statute provides expressly for that case by the 75th section; here it was not.] The 91st section of the act provides that the discharge may be pleaded generally.

PARKE, B.—I am of opinion that this plea is bad in form, on the ground assigned as cause of demurrer, that it does not recite the act of Parliament correctly; and also in substance, on the ground that a discharge from the original debt is no discharge as to the bill, which is in the hands of a third person. The proper course is to insert the holder's name in the schedule, or to state that he is not known; otherwise it is no discharge as against the holder.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

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June 23.

ASSUMPSIT.—The first count of the declaration stated, that heretofore, to wit, on the first day of December, 1838, in consideration that the plaintiff, at the request of the defendant, would purchase divers, to wit, 15 shares of and in a certain public foreign undertaking, called the Bank of Belgium, at the price, to wit, of 53*l.* 15*s.* per share, the defendant promised the plaintiff that he the defendant would, upon request, accept the said shares, and pay for the same the money for which the plaintiff should have so purchased the same. The declaration then averred, that whereas the plaintiff, relying upon the said promise, did afterwards, to wit, on &c., purchase the said shares at and for the said price (amounting to £660); nevertheless the defendant did not nor would then or ever accept the said shares, or pay for the same the money for which the plaintiff had so purchased the same, or any part thereof, although the defendant was afterwards, to wit, on &c., and oftentimes afterwards, requested so to do by the plaintiff, but the defendant hath hitherto refused and still doth refuse so to do; and thereby the plaintiff was then, to wit, on &c., obliged to pay to Mr. Falcon, namely, the person from whom he purchased them, or pay for them the money for which the plaintiff had so purchased the same, although often requested so to do by the plaintiff, and thereby the plaintiff was obliged to pay to F., the person from whom he purchased the shares, the money he was liable to pay him by reason of such purchase.

Semble, that whether the count imported that the plaintiff was to purchase the shares from F., and afterwards sell them to the defendant, or that he was to purchase them from F. as agent for the defendant, it was bad in substance, for want of an allegation of readiness and willingness, either in the plaintiff or in F., to deliver them to the defendant.

To this count the defendant pleaded—1. That the contract was made in France, the plaintiff and defendant residing therein; that, by the law of France, a person who has neither the property, nor the actual nor constructive possession of a thing, cannot sell it; and that the said shares were at the time when &c., the property of F., held by him in his own right, and not the property, nor in the actual nor constructive possession of the plaintiff. 2. That the contract was made in France, &c.; that, by the law of France, all wagers are void; and that the contract was made by the plaintiff and defendant as in the declaration stated, for the purpose of evading the law of France, and to give it the colour of a bonâ fide and legal transaction, whereas, in fact, it was a wager made on the price of certain public securities on a future day.

Held, on special demurrer, that these pleas were bad, as amounting to the general issue.

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chased the said shares, the sum of £660, being money which the plaintiff was then liable to pay to the said Mr. Falcon, by reason of such purchase.—There were also counts for money paid, work and labour, interest, and on an account stated.

Third plea (to the first count), that the contract therein alleged was made and entered into in parts beyond the seas, to wit, at Paris, in the kingdom of France, they, the plaintiff and the defendant, then respectively being and residing therein, and subject to the laws thereof; in which said kingdom the law then was and from thence hitherto hath been and still is this, to wit, that a person who has neither the property nor the actual nor constructive possession of a thing cannot sell it; and the defendant saith that at the said time when, &c., in the first count mentioned, the said shares were the property of the said Mr. Falcon, and held and enjoyed by him in his own right, and for his own benefit, and not the property of, nor in the actual nor constructive possession of, the plaintiff.—Verification.

The fourth plea, (to the first count), after the same prefatory averments, alleged, that by the law of France all *wagers* are null and void, and that the contract was made and entered into by the plaintiff and defendant in manner and form as in the first count mentioned, with the sole purpose of avoiding the laws of the said kingdom, and to give it the colour and appearance of a *bonâ fide* and legal transaction, whereas, in fact, it was a wager made upon the price of certain public securities of the kingdom of Belgium on a certain day then to come, to wit, the 31st December then next following.—Verification.

The fifth and sixth pleas to the second and subsequent counts of the declaration, after averments of the identity of the causes of action in those counts mentioned with that arising out of the contract alleged in the first count, set forth, by way of defence to those counts, the same facts as the third and fourth pleas respectively to the first count.

To all these pleas the plaintiff demurred specially, on the following grounds. To the third plea:—that it appears on the face of the plea that the contract in the first count mentioned is legal, according to the law of France, as set forth in the plea, and that the plea is therefore bad in substance. That it is nevertheless bad in point of form, on these grounds; first, that it is uncertain whether the term “property,” used in the plea, means property according to the law of England, or according to the law of France; 2ndly, assuming that it means property according to the law of France, that the plea should have set forth what the rules of that law are, which determine property such as that mentioned in the first count; 3rdly, that the plea is uncertain, in not stating the day and year, and exact time, when the shares were in the actual or constructive ownership of Mr. Falcon.

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To the fourth plea; that it is bad in substance, inasmuch as it shews only matter which, according to the law of France, avoids *wagers*, whereas the contract declared on is not a wager. That it is also bad in form, for these reasons:—1st, that it does not shew the contract mentioned in the first count is a wager; 2ndly, that the allegation, that the contract is a wager, is repugnant to the admission in the plea, that the contract was made in manner and form as in the first count is alleged; 3rdly, that the plea amounts to the general issue.

The causes of demurrer to the fifth plea were the same as to the third, with this additional point, that the fifth plea amounts to the general issue to the third count of the declaration. And to the sixth plea, the causes of demurrer were the same as to the fourth.

Joinders in demurrer.

The defendant also stated the following points for argument:—The defendant will contend that the first count of the declaration is bad; 1st, because the request to accept or pay for the shares is not alleged to be made upon the

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Atkinson, contra.—The principal objection made to the fourth plea is, that enough is not stated in it to shew this contract to be a wager. Now, the plea alleges, that by the French law all wagers are void, and that the contract was made and entered into *as in the first count mentioned*, in order colourably to evade that law, and give it the appearance of a legal transaction, whereas in fact it was a wager. It could not be necessary to *define* a wager; the jury are to determine whether this was such in fact. If the plea had gone on to allege what is required on the other side, it would have been bad, either as an argumentative traverse, or as stating evidence. A replication of necessities generally, to a plea of infancy, is good, without shewing *how* they were necessities. So, to a plea of the Statute of Frauds, a replication that there is a memorandum of the bargain in writing is sufficient, without setting it out: *Lysaght v. Walker* (a), *Wakeman v. Sutton* (b). On a traverse of the plea, the question would have been determined, whether this was a wager, and so void. But the plea not only shews it to be a wager, but also of what nature it is; viz., on the future price of the public securities of Belgium. A plea of gaming does not shew how the game of hazard is played. The Court can see here that the question to be determined is matter of fact, and not of law.

Nor do any of the pleas amount to the general issue. They are special pleas of illegality. A plea which admits the contract, but shews it to have been made subject to certain rules, which were not complied with by the plaintiff, is a good plea in confession and avoidance: *Smart v. Hide* (c). Here the pleas do not deny the contract, but give the plaintiff a colourable right of action, and avoid it by matter collateral.

The declaration is bad in substance. It contains no

(a) 5 Bligh, N.S. 1.

(b) 2 Ad. & E. 78; 4 Nev. & M. 114.

(c) 8 M. & W. 723.

avermert even of *readiness and willingness* to deliver the shares to the defendant, the substantial ground of action being the not *accepting* and paying for them. The declaration must aver performance of all conditions precedent. On general demurrer, indeed, an averment of readiness and willingness to deliver is sufficient, because a traverse of it puts in issue the *ability* to deliver: *De Medina v. Norman* (a). Neither is it alleged that a reasonable time has elapsed for acceptance and payment, or shewn that the cause of action was complete before the commencement of the suit. Where no time is fixed by the contract itself, it must be shewn that a reasonable time for the performance of it had elapsed before the commencement of the suit: *Parkinson v. Whitehead* (b), *Sansom v. Rhodes* (c), *Stavart v. Eastwood* (d). [Parke, B.—Those cases are very different. Here the declaration avers a request to the defendant to accept and pay, which must be taken to have been made before the commencement of the action. It is different in a plea: *Tucker v. Webster* (e). There is nothing in this objection.] At all events, the declaration ought to have averred a readiness and willingness to deliver the shares, either by the plaintiff or Falcon, from whichever of them the purchase was made, which is left ambiguous. The defendant could not accept, without a capacity on the part of the owner of the shares to make the transfer. [Parke, B.—Supposing it is to be taken to mean that the plaintiff would purchase of Falcon for the defendant, is it necessary that the plaintiff should do any more than is stated? Does not the defendant undertake to get the shares from the vendor as well as he can?] That is left ambiguous, and the Court will, therefore, presume in favour of the defendant, upon his pleas.

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(a) 9 M. & W. 820.

(c) 6 Bing. N. C. 261; 8 Scott,

(b) 2 Scott, N. R. 620; 2 Man. 544.

& G. 326.

(d) Ante, 197.

(e) 10 M. & W. 371.

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Atherton, in reply, was desired to apply himself to the declaration.—On general demurrer, the reasonable construction of the contract is, that, in consideration that the plaintiff would purchase the shares of Falcon *for the defendant*, the latter agreed to accept and pay for them. The real ground of action stated is a special damage, in the plaintiff's being put to the expense of paying for them in the first instance, in consequence of the defendant's default; if it were a contract of sale between the plaintiff and the defendant, this statement would be absurd. And if such be the proper construction of the declaration, the necessity for an averment of readiness and willingness fails, because that applies only to the case of buyer and seller, whereas this is the case of an agent buying for his principal.

PARKE, B.—There is a difficulty about the declaration, but none as to the pleas. Assuming the construction of the contract to be, that the plaintiff would purchase of Falcon for himself, and afterwards sell to the defendant on request, then it is clear the declaration ought to aver a readiness and willingness to deliver; and the averment of *request* is different from that of being ready and willing. Taking the contract to be the other way, that, in consideration that the plaintiff would buy the shares as agent of the defendant, the defendant would accept them from Falcon on request, and pay for them, then, if it means merely that the defendant would accept them from Falcon, if he was ready to deliver them, (not that he would procure them from Falcon), in that case also there ought to be an averment of readiness and willingness in Falcon to deliver them. The agreement seems to be only that the defendant will accept, and then pay, not that he will at all events pay, or at all events procure the shares from the original vendor; and the breach is for not *accepting and paying*. It will be better to amend on both sides, without costs; the

plaintiff, by adding an averment of readiness and willingness; and the defendant, by striking out the pleas, and pleading the general issue. The pleas are clearly bad as they stand.

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Leave to amend accordingly.

BUTCHER v. GEORGE DRUMMOND STEUART.

June 22.

THIS was an action of assumpsit; and the declaration alleged, that the plaintiff had recovered in an action of assumpsit, in this court, against one Robert Steuart, the sum of 3007*l.* 12*s.* which in and by the said court were adjudged to the plaintiff for his damages, &c.; and that the plaintiff, for having execution, &c. sued out a ca. sa., directed to the sheriff of Middlesex, which writ was indorsed to levy 2611*l.* 7*s.* 3*d.*, and interest from the date of the writ on 2578*l.* 9*s.* 9*d.*, besides sheriff's poundage, officers' fees, &c.; and by virtue of which said writ the said sheriff *duly took and arrested* the said R. Steuart by his body, and then had

Assumpsit.
The declaration alleged, that the plaintiff had recovered against one R. S. the sum of 3007*l.* 12*s.*, and sued out a ca. sa., directed to the sheriff of Middlesex, indorsed to levy 2611*l.* 7*s.* 3*d.* and interest on £2578, besides sheriff's poundage, officers' fees, &c., by virtue of which

writ the said sheriff duly took and arrested the said R. S. by his body, and then had and kept and detained him in custody under and by virtue of such writ, and by execution of the same; and thereupon, and whilst the said R. S. was so in custody, to wit, on &c., in consideration that the plaintiff would procure the release of the said R. S. from and out of the said custody under the said writ, on payment of poundage and officers' fees, he, the defendant, promised the plaintiff to pay him the sum of £500, part of the said damages and interest, within one month, and to give a bond for payment of the remainder of the debt, interest, and costs, in five years. The following agreement, intitled in an action between R. B. plaintiff, and R. S. defendant, and signed by the present defendant, was given in evidence:—"In consideration of your having released the above-named defendant from custody, I hereby engage, within one month from this date, to pay you," &c. (as stated in the declaration). This memorandum was addressed to the plaintiff, and was then accepted by him, and he, at the same time, gave an order for the discharge of R. S., "on payment of sheriff's poundage and officers' fees, judgment having been satisfied," and the poundage and fees were then paid by the defendant. The sheriff's officer then stated, that R. S. was free as to that action, but there being two detainers lodged against him, R. S. was detained in custody at the suit of other parties. The ca. sa. was irregular, it having been issued into Middlesex, without any previous ca. sa. into Kent, where the venue was laid.

Held, first, that the agreement to release R. S. was both prospective and conditional, and therefore that the contract was proved as laid.

Secondly, that the contract was not within the Statute of Frauds, 29 Car. 2, c. 3, s. 4, and therefore did not require to be in writing; but had it been within the statute, *quære*, whether there was a sufficient memorandum in writing to satisfy it.

Thirdly, that the allegation in the declaration, that the sheriff *duly* arrested R. S., did not mean that R. S. was in custody, so that he could not be discharged without the defendant's consent, but that the sheriff had duly acted under the writ, so as not to become a trespasser, and therefore that the allegation was proved.

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and kept and detained him in custody under and by virtue of such writ, and in execution of the same ; and thereupon, and whilst the said R. Steuart was so in custody as aforesaid, to wit, on the 23rd of July, 1841, in consideration that the plaintiff would procure the release of the said Robert Steuart from and out of the said custody under the said writ, on payment of poundage and officers' fees, the defendant promised the plaintiff to pay him the sum of £500, part of the said damages and interest, within one month from the day and year last aforesaid, and to deliver to the plaintiff a bond, under the hand and seal of the said Robert Steuart, the defendant, and some other responsible person, conditioned for the payment of the remainder of the said damages and interest at the expiration of five years from the day and year last aforesaid, with interest thereon at the rate of £5 per cent., payable half yearly. It then averred, that the plaintiff, confiding in the promise of the defendant, did, on the day and year last aforesaid, procure the release of the said Robert Steuart from and out of the said custody under the said writ, on the terms aforesaid, and he was then released from and out of such custody, whereof the defendant then had due notice : and although one month from the day and year last aforesaid had elapsed before the commencement of the suit, the defendant had not paid the plaintiff the said sum of £500, or any part thereof &c., although often required so to do, and the same remains wholly due and unpaid, nor has the defendant delivered to the plaintiff the said bond so conditioned as aforesaid, or any other bond.

To this the defendant pleaded, first, non assumpsit ; secondly, that the said Robert Steuart was not duly taken or arrested by his body, or had or kept in custody under and by virtue of the said writ, in manner and form &c. ; thirdly, that the plaintiff did not procure the release of the said Robert Steuart from and out of custody, in manner and form, &c.

Issue having been joined on the above pleas, the cause came on to be tried before Lord *Abinger*, C. B., at the Middlesex Sittings after Trinity Term, 1842, when a verdict was found for the plaintiff for the damages in the declaration, subject to the opinion of the Court upon the following case.

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After the plaintiff had declared in the original action against Robert Steuart, an order by consent was, on the 9th March, 1841, made by *Alderson*, B., in the said cause, to stay proceedings on payment of £2500, the amount of the debt for which the action was brought, with interest and costs, to be taxed, and paid on the 19th March; and the said Baron did thereby further order, that, unless the said debt, interest, and costs were paid as aforesaid, the plaintiff should be at liberty to sign final judgment for the damages in the declaration, and issue execution, either by *fi. fa.* or *ca. sa.*, for the debt and interest, with costs of judgment and execution, sheriff's poundage, officers' fees, and all other incidental expenses; and default being made, the plaintiff, on the 19th of March, as directed by the order, signed judgment for 300*l.* 12*s.*, being the amount of the damages laid in the declaration, and the costs. The venue in the action was laid in Kent, and a *ca. sa.* had issued into Middlesex, without any previous *ca. sa.* into Kent. This *ca. sa.* was indorsed to levy 261*l.* 7*s.* 3*d.*, besides sheriff's poundage, officers' fees, and all other incidental expenses, with interest at £4 per cent. on 257*l.* 9*s.* 9*d.* from the date of the writ till payment. The said Robert Steuart was arrested on this writ on the 22nd July, 1841. He had been a member of the House of Commons up to the time of the dissolution of Parliament which took place on the 23rd June, 1841, being less than forty days before the said arrest. He had been appointed by Government to a lucrative situation abroad, the duties of which it was important for him to attend to immediately, and it was necessary for him to be discharged on

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the 23rd July. This was communicated to the plaintiff, and on that day the present defendant, with his attorney, entered into negotiations with Messrs. Ling and Harrison, the attorneys for the plaintiff, for the discharge of the said Robert Steuart, and the present defendant eventually, but while Robert Steuart was still in custody, signed the following memorandum :—

“ In the Exchequer of Pleas,

“ Between William Butcher, plaintiff,
and

“ Robert Steuart, defendant.

“ In consideration of your having released the above-named defendant from custody, I hereby engage, within one month from this date, to pay you the sum of £500, and to hand you over a bond for the remainder of the debt, interest, and costs in this action, payable at the expiration of five years, with interest at the rate of £5 per cent. in the mean time, payable half-yearly. And I further engage that such bond shall be from the said Robert Steuart, myself, and another responsible person. Dated this 23rd July, 1841.

“ G. Drummond Steuart.”

“ To Mr. W. Butcher, the above-named plaintiff.”

This memorandum was accepted by the plaintiff's attorney, and in pursuance of it the following document in writing was afterwards, and on the same day, and at the same meeting, in the presence of the defendant and his attorney, given by the plaintiff's attorney to the sheriff of Middlesex :—

“ In the Exchequer of Pleas,

“ Between William Butcher, plaintiff,
and

“ Robert Steuart, defendant.

“ Discharge the above defendant out of your custody on payment of sheriff's poundage and officers' fees, judgment

having been satisfied; and for thus doing, this is your authority. Dated 23rd July, 1841. *Ech. of Pleas, 1843.*

“Ling & Harrison, plaintiff’s attornies.”

“To the Sheriff of Middlesex and his officers.”

“Witness, H. S. Westmacott.”

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The poundage, officers’ fees, and the fee usually paid on the discharge of a prisoner, were paid to the sheriff’s officer by the defendant, at the time of the documents being handed to him. The sheriff’s officer then stated that R. Steuart was free as to that action, and agreed to release him out of custody, if there were not any detainers lodged against him, but said he must search the office before he released him; and it being discovered on such search that two detainers against him had been lodged with the sheriff previously to the 23rd July, he was not released. On the 23rd July, and before the above-mentioned memorandum was signed by the defendant, R. Steuart had taken out a summons to be discharged out of custody as to this action, he having privilege of Parliament. This summons was attended the same day at the Judge’s private house by the plaintiff’s attorney, he having received the assurance of the present defendant’s and R. Steuart’s attorney, that the proposed discharge by the Judge’s order should not prejudice the defendant’s undertaking. The learned Judge thereupon made the following order:—

“On hearing the attornies or agents on both sides, I do order that the defendant be discharged out of the custody of the sheriff of Middlesex as to this action and all detainers, the said defendant being privileged from arrest. Dated 23rd July, 1841.

(Signed) “J. PATTESON.”

The said Robert Steuart was then released from custody, as well in the actions in which the detainers had been lodged, as in that at the suit of the present plaintiff,

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and the sheriff returned the poundage fees; but the present defendant did not pay the sum of £500, or deliver the bond to the plaintiff, according to the agreement.

The question for the opinion of the Court is, whether the verdict should be entered for the plaintiff or the defendant.

The defendant contends, first, that the contract was not proved as laid; secondly, that there was no sufficient consideration for the alleged promise; thirdly, that the contract was void under the Statute of Frauds; fourthly, that the several proceedings against R. Steuart were irregular, and that R. Steuart was not duly arrested thereon; fifthly, that the plaintiff did not procure the release *modo et formâ*.

The Court is to be at liberty to draw any conclusions of fact which a jury might have drawn; and to direct for which party the verdict is to be entered. If for the plaintiff, the verdict to be for the principal sum of £500, and the principal sum which should have been secured by the bond, with the interest on both, subject to be reduced to £500, and interest thereon, and the interest which would have become due on the bond, on the defendant delivering a bond according to the terms of the memorandum above set forth.

Martin, for the plaintiff.—The plaintiff is entitled to retain the verdict on all the issues. The first objection is, that the averment in the declaration, that the sheriff *duly* took and arrested the said Robert Steuart under and by virtue of the writ, was not supported by the evidence. There is no question that he had in fact so taken him into custody under the writ. But it will be objected, that the writ was issued into Middlesex without any previous writ having been issued into Kent, where the venue was laid. But at the utmost, that would only be an irregularity, which might have been amended: *Warne v. Haddon* (a),

(a) 9 Dowl. P. C. 960.

Greenshields v. Harris (a). It would still be a perfect justification to the sheriff in making the arrest. Therefore the averment that Steuart was duly arrested was perfectly proved, for he was legally in custody.

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Another objection is, that the arrest was not lawful, the defendant being at the time entitled to privilege of Parliament. But the Parliament had been dissolved thirty days before the arrest took place, and therefore the privilege had expired. The privilege is eundo, morando, et redeundo. Now thirty days was more than ample time for Mr. Steuart to have travelled on his return to the furthest part of the United Kingdom. This subject was much discussed in the case of *Holiday v. Pitt* (b). It appears from that case, that the notion that forty days was allowed for this purpose, arose from an old Irish act, 3 Edw. 4, (the Irish acts being generally transcripts of laws enacted here), which expressly recited the privilege to have continuance for forty days before and after the Parliament finished. But it is there said, that that point was not much insisted on, it appearing that the House of Commons had always avoided determining the question, and had left it at large to a *convenient time*, of which themselves were the judges. It is stated that, in the case of a Mr. Martin, twenty days before the meeting of Parliament had been held to be within the convenient time. In the case then before the Court, the defendant had been arrested two days after the dissolution, which was clearly too short a period. The Court took time to consider, but afterwards "the Chief Justice declared that all the judges were of opinion that Mr. Pitt was entitled to his privilege *redcundo*, for a *convenient time*, and that within that time he was arrested" (c). It appears, therefore, from that case, that there is no fixed time, but that it is left to a convenient and reasonable time; but thirty days must clearly be far beyond a reasonable time for the privilege to exist, for a

(a) 9 M. & W. 774.

(b) 2 Stra. 985.

(c) Ibid. 968.

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member to return to his constituents in the present day ; therefore the privilege did not exist at the time of this arrest. But even supposing he were arrested during the continuance of his privilege, he is still in the lawful custody of the sheriff until he is discharged from such custody on the ground of privilege. He was in actual custody under the execution at the suit of the plaintiff at the time of this agreement, and his discharge from custody was an amply sufficient consideration. The issue on the plea is, whether Robert Stuart was duly taken or arrested, or had or kept or detained in custody, by virtue of the writ. To satisfy that allegation, it is sufficient to prove that in point of fact he was at the time in lawful custody under the writ.

Secondly, the next question is, whether the contract was void under the Statute of Frauds, which arises on the plea of non assumpsit. It is submitted that this is not a contract within the Statute of Frauds ; for it is not a promise to answer for the debt, default, or miscarriage of another person. It is an absolute independent promise, in consideration that the plaintiff will do a particular act. *Goodman v. Chase* (a), is directly in point. It was there held, that where a defendant, taken on a ca. sa., is discharged out of custody by consent of the plaintiff, the debt itself is extinguished ; and therefore a promise by a third person to pay that debt, on condition of that discharge, is an original promise, and not within 29 Car. 2, c. 3, s. 4. Lord *Ellenborough*, C. J., there says, " By the discharge of Chase with the plaintiff's consent, the debt as between those persons was satisfied . . . Then if so, the promise by the defendant here is not a collateral but an original promise, for which the consideration is the discharge of the debt as between the plaintiff and Chase. That being so, it becomes wholly unnecessary to consider the question arising out of the construction of the fourth section of the statute." But even if this contract be within the statute, there

(a) 1 B. & Ald. 297.

was here a valid contract in writing. The Court are to look at the documents and facts taken together, to see what was the agreement entered into: *Montague v. Tidcombe* (a), *Lawrence v. Blatchford* (b). Robert Steuart having obtained a lucrative situation abroad, and it being necessary that he should procure his discharge by the 23rd of July, a negotiation was entered into with the plaintiff for his discharge, and the plaintiff agreed to release him on the defendant's giving the written memorandum in question, which is, that "in consideration of your *having released* the above-named defendant from custody, I hereby engage" so and so. Now the plaintiff had not then released him, for he was then in custody; but a written discharge was given after the document was signed; and he was declared free from arrest under that writ. In *Payne v. Wilson* (c), the agreement was similar to the present. There the declaration stated, that in consideration that the plaintiff, at the request of the defendant, would consent to suspend proceedings against A. on a cognovit, the defendant promised to pay £30 on account of the debt for which the cognovit was given, on the 1st of April then next; and it averred that the plaintiff did suspend proceedings on the cognovit accordingly. The plaintiff, at the trial, proved the following agreement in writing: "The plaintiff having, at my request, consented to suspend proceedings against A., I do hereby, in consideration thereof, personally promise to pay £30 on account of the debt, on the 1st day of April." It was objected, on the part of the defendant, that there was a variance between the contract proved and that alleged in the declaration; the consideration for the promise stated in the declaration being extortory, whereas the consideration proved had been executed. But it was held that, as the request must have preceded the consent to suspend the proceedings, the contract might

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(a) 2 Vernon, 519.

(b) *Ibid.* 457.

(c) 7 B. & C. 423.

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be declared on as an executory contract, and consequently that there was no variance. Now the contract stated in this declaration was proved by the evidence, and by the production of the written memorandum, and the discharge given pursuant to it. Assuming this case, therefore, to be within the statute, it is satisfied.

The last objection is, that the plaintiff did not procure the release as alleged. The plaintiff, however, gave a written discharge as to the action at his suit, and that was all he was bound to do under this agreement. The circumstance of there being detainers against Mr. Steuart at the suit of other persons, could not affect the plaintiff.

Gurney, contra.—First, as to the question whether the defendant Robert Steuart was duly arrested; it is submitted that he was not. The authorities shew, not only that the suing out of the ca. sa. into Middlesex, without any previous writ having been issued into Kent, was an irregularity, but that the arrest was illegal: *Brand v. Mears* (a), *Towers v. Newton* (b). In the latter case, the Court not only set aside the execution, but discharged the defendant out of custody, which shews that he was not lawfully in custody. There, the venue being laid in Yorkshire, a fi. fa. issued into that county, on which the sheriff returned a levy of part, and nulla bona as to the residue. Afterwards a ca. sa. issued into Middlesex, reciting the Yorkshire fi. fa. and return thereto; and after that a ca. sa. into Yorkshire, also reciting the Yorkshire fi. fa. and the return thereto. The defendant was taken on the Yorkshire ca. sa., but discharged on the ground of supposed privilege at the time of arrest. After the supposed privilege had expired, he was taken in Middlesex on the Middlesex ca. sa. The Court discharged the defendant, and set aside the execution on the Middlesex ca. sa. as irregular, because

(a) 3 T. R. 388.

(b) 1 Q. B. 319; 4 Per. & D. 625.

there should have been a Yorkshire ca. sa. in the first instance, and then a Middlesex test. ca. sa. reciting the Yorkshire ca. sa.; and it was held that it could not be amended, as the Yorkshire ca. sa. had been issued after the Middlesex ca. sa. *Greenshields v. Harris* (a) has nothing to do with the present case. [Parke, B.—That was a case in which we had occasion to consider the power of amendment since the writ is made returnable immediately, and we held that, as the plaintiff produced an original writ, issued into the proper county, bearing date the same day with the judgment and testatum, with a general return of non est inventus, the plaintiff had proper materials for making up the roll; and we distinguished it from *Towers v. Newton*, because the testatum in that case bore date on an earlier day than the original writ on which it professed to be founded.] Whatever could have been done by the Court to amend the writ, that could not render the arrest legal at the time it was made; it could not make it a due arrest.

The next objection is, that Steuart was not duly arrested, because he was entitled to privilege. The case of *Holiday v. Pitt* is also reported in Cas. Temp. Hardw. 28, and there it was held, by the unanimous opinion of all the Judges, that the defendant was entitled to privilege of Parliament redivundo; but that it was not necessary in that case to determine to what time it was limited; for supposing it to be only for a convenient time, the defendant was arrested within that convenient time. But in *Jackson v. Kirton* (b), it was alleged in the defendant's plea, and not denied, that "by privilege of Parliament, those of the Parliament, and their necessary servants, ought not to be arrested by the space of forty days before the Parliament, nor sitting the Parliament, nor forty days after;" for, although the Court gave judgment for the plaintiff on demurrer, it was on another ground. And in *Jenkins's Centuries* (c), it is said

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(a) 9 M. & W. 774. (b) 1 Brownl. 91. (c) Fo. 118, Case 35.

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expressly, that the privilege of members of Parliament "extends to forty days before the Parliament and forty days after:" for which is cited 2 Edw. 4, f. 8, which shews that the notion did not spring out of the Irish Act of 3 Edw. 4. That act did not enact any thing new in this respect, but merely declared what the known law was; and at that time the Common Law of England prevailed in Ireland: Com. Dig. tit. 'Ireland;' 1 Bla. Com. 101. And in Bla. Com., vol. 1, p. 165, the privilege of a commoner as to freedom of person is stated to be "for forty days after every prorogation." This privilege makes the arrest illegal originally, but the defendant's being entitled to his discharge will also affect the other parts of the case.

Thirdly, the contract was not proved as alleged in the declaration. The only evidence admissible to prove the contract was the memorandum itself, and that does not accord with the allegation in the declaration. The terms of the contract having been reduced into writing, and signed by the defendant, that is the only binding contract, and nothing else can be introduced to prove the contract: *Ford v. Yates* (a). If parol evidence were permitted to be given, it would be extremely dangerous. The parties should take care that all the terms are introduced into that which is to be the binding contract. Now here the memorandum is very different from the contract alleged in the declaration. The declaration states, that in consideration that the plaintiff would procure the release of Stewart from custody *under the said writ*, on payment of poundage and officers' fees, the defendant promised the plaintiff to pay him the £500, part of the said damages, and interest, within one month from the day and year last aforesaid, and to deliver the bond &c.: but the memorandum is, "in consideration of your *having* released the above-named defendant from custody, I hereby engage, within one month

(a) 2 Scott, N. R. 645; 2 Man. & Gr. 549.

from this date, to pay you the sum of £500, and to hand you over a bond," &c.. Now that says nothing as to a mere release from custody *under that writ*, but speaks of a discharge generally from custody. It is impossible, therefore, to reconcile the one with the other. The plaintiff could never aver performance of that agreement, and he does not do so. *Payne v. Wilson* (a) was a very different case: there the agreement was to be inferred from the written memorandum. Another respect in which the declaration differs from this memorandum is, that the former states it to be on payment of poundage and officers' fees, but nothing is said as to that in the memorandum; and poundage is a payment which the execution-creditor ought to have made, and therefore this would be relieving himself from a burthen.

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But, fourthly, even if there were nothing in that objection, the case is within the Statute of Frauds, and such a contract must be in writing, and no parol evidence would be admissible to alter or vary it. That was expressly decided in *Marshall v. Lynn* (b). *Goodman v. Chase* (c) has been relied upon, where it was held, that it was not a promise to answer for the debt of another, because the debt was extinguished by the discharge. Here, however, the defendant was entitled to be discharged on the ground of his privilege, and he was so discharged, though liable to be taken again after his privilege had ceased; and consequently the debt was not extinguished. This, therefore, is a special promise to answer for the debt of another. Nothing can arise on the matter of fact, contrary to the statement in the order that he was discharged on the ground of privilege. [Parke, B.—The moment the discharge was given by the plaintiff, he was let out of custody.] Whether he was entitled to his privilege or not, he was in fact discharged under the Judge's order, which

(a) 7 B. & Cr. 423.

(b) 6 M. & W. 109.

(c) 1 B. & Ald. 297.

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But it was agreed by the defendant's attorney, that the discharge should not prejudice the defendant's undertaking; and whatever was done under the Judge's order was to be without prejudice to the defendant's undertaking.] The declaration of the defendant's attorney could not affect the original agreement. The situation of Robert Stewart was altered by the change of circumstances. The plaintiff would not be bound not to arrest him again after his privilege had expired, by the declaration of the attorney. This case is clearly within the statute.—He cited *Edwards v. Kelly* (a), *Castling v. Aubert* (b), and *Thomas v. Williams* (c). In 1 Saund. 211. c., n. 1, it is said, "Whether each particular case comes within this clause of the statute or not, depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise." In *Green v. Cresswell* (d), where the defendant, an attorney, requested the plaintiff to execute a bail-bond to the sheriff for a client of the defendant, and promised to indemnify him, it was held, that it was a promise to answer for the debt or default of another within the 4th section of the Statute of Frauds. There the above passage from Saunders was cited and approved of by Lord Denman, C. J., in delivering the judgment of the Court: and in conclusion his Lordship says, "The original party remained liable, and the defendant incurred no liability, except from his promise." So here, the original party remained liable, and there was no liability in the third party, except what arose from his express promise.

The only other point is, as to the question whether the

(a) 6 M. & Selw. 201.

& Ry. 625.

(b) 2 East, 325.

(d) 2 Per. & D. 430; 10 Ad. &

(c) 10 B. & Cr. 664; 5 Man.

Ell. 453.

plaintiff did procure the release of Robert Steuart. He clearly did not; for the learned Judge would not have made the order except on the ground that he was entitled to his privilege. Whether the plaintiff consented to his discharge or not, is not here material: he did not *procure* his discharge as alleged. [*Parke, B.*—Supposing the case not to be within the Statute of Frauds, is there not a conditional agreement that the defendant should pay the poundage and officers' fees. It is not inconsistent with the written memorandum, but it is acted upon, and the money is paid the same day. I think that is good evidence of the substitution of a new contract. No doubt the parties thought, at the time they entered into this agreement, that there was no other writ against Robert Steuart.] That would be calling on the Court to presume an agreement, which the defendant would not have entered into if he had known there were other detainers against him. It is submitted, that there were no circumstances which would authorize the setting aside the original written contract, and substituting a new contract.

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Martin, in reply.—As to the first objection, the cases cited only shew, that the ca. sa., having been issued without a previous ca. sa. into Kent, was a mere irregularity; and if the writ was put into the sheriff's hands, he was bound to execute it, and R. Steuart was duly arrested under it. [*Parke, B.*, referred to *Cassidy v. Steuart (a)*.] Then as to the privilege of Parliament, there is no authority for its continuing for forty days after the dissolution. The case of *Jackson v. Kirton (b)* is no authority whatever for it, as the Court decided the case on a totally different ground: and the case in *Jenkins's Centuries*, 118, seems to have been merely a decision, that if a member of Parliament be in execution before the Parliament, he shall not be dis-

(a) 2 Scott. N. R. 432; 2 Man. & Gr. 437.

(b) Brownl. 91.

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charged by privilege afterwards. The mere recital in the Irish Act can have no weight; and there is nothing like authority for the continuance of the privilege for forty days. The case, therefore, comes back to the rule laid down by all the Judges in *Holiday v. Pitt* (a), which is, that a member is entitled to privilege for a convenient and reasonable time to return to his home. But it is enough for the plaintiff to shew that Robert Steuart was actually in custody under the writ, as that was a sufficient consideration for the agreement. Then, as to the question on the Statute of Frauds, it is admitted that the rule stated in *Saunders* is correct, and that it depends on whether the original liability continues. In this case it clearly did not, for the defendant was discharged by the plaintiff, the judgment having been satisfied by his having had corporal possession of the debtor's person. The cases cited on the other side were decided on the ground that the original liability remained. *Goodman v. Chase* is a direct authority in favour of the plaintiff on this point, and the Court are bound by it. If the party had been discharged for mere irregularity, the debt would have remained. This case is therefore not within the statute; but if it were, there is sufficient to satisfy it, according to *Payne v. Wilson*.

PARKE, B.—I had some doubt during the argument, as to the meaning of the allegation in the declaration, that “the said sheriff *duly* took and arrested the said Robert Steuart by his body;” and in one sense the arrest was not duly made, inasmuch as it was imperfect on account of the irregularity in the writ. But, on full consideration, I am of opinion that we ought to construe the word “duly” to refer to the act of the sheriff alone, and in that sense, the defendant was duly arrested. Now, as to the different objections which have been raised to the plaintiff's right to

(a) 2 Str. 938.

recover in this action, we will consider them, not in the order in which they were argued, but as they arise on the pleadings; and I am of opinion that the plaintiff is entitled to have the verdict entered for him on all the issues.

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The first question arises on the plea of non-assumpsit, and is, whether this contract was proved as laid. Now, if we were to hold this contract to be within the 4th section of the 29 Car. 2, c. 3, and so required to be in writing, I should have considerable doubt whether there was here a sufficient memorandum in writing to satisfy the statute. But it appears to me that this is an absolute promise, in consideration of the agreement of the plaintiff to discharge the defendant from execution. It is not a promise to answer for the debt, default, or miscarriage of another, but is a promise to pay a debt in the event of the other contracting party doing a certain act. It is therefore within the decision of *Goodman v. Chase*, and does not require a memorandum in writing to satisfy the Statute of Frauds. We do not, therefore, feel embarrassed with that question, about which, I confess, I should have entertained serious doubts, whether there was here a sufficient memorandum in writing to satisfy the statute.

The contract stated in the declaration is, that in consideration that the plaintiff would procure the release of Robert Steuart from and out of the custody of the sheriff under the writ, on payment of poundage and officers' fees, the defendant promised to pay the amount in a certain manner therein specified. This contract is sought to be proved by what occurred during the negotiations entered into between the plaintiff and defendant for the discharge of Robert Steuart. Now, in the first place, there is the memorandum which was prepared by the plaintiff's attorney, and signed by the defendant. It is intitled, "Between Robert Butcher, plaintiff, and Robert Steuart, defendant," and states that, "in consideration of your *having released* the above-named defendant from custody, *I hereby engage,*

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within one month from this date, to pay you the sum of £500, and to hand you over a bond for the remainder of the debt, interest, and costs in this action, payable at the expiration of five years, with interest at the rate of £5 per cent. in the meantime, payable half-yearly," &c. Two objections are made to this memorandum, as proof of the contract stated in the declaration. The first is, that the memorandum incorrectly speaks of the release of R. Steuart as a matter which had already taken place; and the other, that this is a release absolute, whereas in the declaration the release is described to have been on payment by the defendant of the sheriff's poundage and officers' fees. With respect to the first objection, I think the engagement in this memorandum may be construed to be, as it really was, prospective, on the release, and that it may be read thus—"I hereby engage to pay you £500 within one month, &c. in consideration of your having *then* released Robert Steuart from custody." Then comes the second objection, which is, that this memorandum discloses an engagement to be performed upon an *absolute* release, whereas the consideration for the promise, as stated in the declaration, is conditional, the discharge being to take place only on payment of poundage and officers' fees. The special case, however, gives the Court power to draw any inference of fact which a jury might draw from the facts stated. Now it appears that the memorandum was accepted by the party to whom it was addressed, who, on the same day, and at the same meeting, drew up and signed the following order, directed to the sheriff: "Discharge the above defendant out of your custody on payment of sheriff's poundage, officers' fees, &c., judgment having been satisfied." And the case goes on to disclose the additional circumstance, that the poundage and fees were paid to the sheriff's officer by the defendant, at the time the order for his discharge was handed over to him. I think these circumstances are sufficient to warrant a jury in coming to the

conclusion, that they might in part vary the terms of this memorandum, so far as it purports to be an absolute release. I infer from the conduct of the parties that such was not their intention: I am therefore of opinion that the memorandum, taken in connection with the other facts of the case, is sufficient proof that the true consideration of this agreement was, that the plaintiff should procure the release of R. S. on payment of poundage and officers' fees as laid. Then it is further objected, that the consideration alleged is a limited and not an absolute release—a release from custody under *the writ at the suit of the plaintiff*, and not a release from custody absolutely. But the memorandum is intitled in the action "Between W. Butcher, plaintiff, and Robert Steuart, defendant:" it is addressed to the plaintiff, and speaks of his procuring a release of the then defendant, which must, I think, be understood to mean a release in that action only; and that he has satisfied that part of the contract by discharging him in that action, for his debt is entirely discharged thereby by consent of the plaintiff. Upon the whole, therefore, looking to the facts of this case, and considering that there was no necessity for a memorandum in writing, I am of opinion that this contract is proved.

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The next question is that to which I have already adverted, namely, whether the preliminary allegation in the declaration is proved. It states, "that the plaintiff had recovered in an action of assumpsit against one Robert Steuart the sum of 3007*l.* 12*s.*, and sued out a *ca. sa.*, directed to the sheriff of Middlesex, and indorsed to levy 2611*l.* 7*s.* 3*d.*, and interest on 2578*l.* 9*s.* 9*d.*, besides sheriff's poundage, officers' fees, &c., by virtue of which said writ the said sheriff duly took and arrested the said Robert Steuart by his body, and then had, and kept and detained him in custody, under and by virtue of such writ, and in execution of the same." The question turns on the meaning of the word "duly;" and if it meant that Robert

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Steuart was so in custody that he could not be discharged without the plaintiff's consent, the allegation would not be proved, because the case shews that he must have been discharged out of custody, unless the Court would consent to amend the writ; he being in fact taken on a *ca. sa.* directed to the sheriff of Middlesex, the venue having been laid in Kent, and there being no original *capias* issued into Kent to found that upon. But if "duly" only means that the sheriff was not a trespasser, and duly acted in pursuance of the writ put into his hands, the averment is proved, for the writ in his hands is sufficient authority to justify him. That, I think, is the way in which we ought to construe this declaration, and if so, there is ample evidence of the consideration alleged to support this promise. The case states, in substance, that Robert Steuart was arrested under a writ, irregular in itself, and from which arrest he might possibly have been entitled to be discharged out of custody by virtue of his privilege as a member of Parliament (a point on which it will not be necessary for us to give any opinion, as I think the undertaking for his discharge was an ample consideration); that the plaintiff released him from his debt without entering into any question as to his right to be discharged generally, and without putting the defendant to the trouble of applying to the Court on the ground of the irregularity in the writ, an application which, after all, might not be successful, as the Court would probably have amended it. A discharge from such an execution is an ample consideration for the promise. Looking at the place in the declaration where the word "duly" is used, I think its meaning must be taken to be, that the sheriff was not a trespasser; and if that be its true construction, it is satisfied by the evidence in the case.

The next and last question is that raised on the third plea, that the plaintiff did not procure the release of the said Robert Steuart from custody in manner and form, &c. Now I think the discharge he was bound by the agreement

to procure was a discharge in that action, which it was clear he did, for on delivering the order for his discharge to the sheriff, Robert Steuart was discharged from the operation of that writ.

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I am therefore of opinion that these three issues ought to be found for the plaintiff, and judgment entered for him accordingly.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

The GENERAL STEAM NAVIGATION CO. v. GUILLOU.

July 10.

THIS was an action on the case, to recover damages for injury alleged to have been done to a ship or vessel of the plaintiffs on the high seas, by her being negligently run foul

To a declaration in case for an injury done to the plaintiff's ship on the high seas by a ship of the

defendant, then being under the care, direction, and management of certain mariners and servants of the defendant, by their negligence, the defendant pleaded as follows :—That the ship, in the declaration secondly mentioned, ran foul of the plaintiffs' ship on a certain part of the high seas, situate between the kingdoms of England and France, and out of the British dominions; that at that time the defendant was, and still is, a subject of the King of the French, and was a holder and proprietor of shares in, and acting director of, a society or company established in France, by royal ordinance, according to the laws of that kingdom, by the name of, &c.; and that, at the time of the collision, the said Company then and from thence hitherto being subjects of the King of the French, were the owners of the said ship, and by their mariners and servants were then navigating the same as subjects of the King of the French, for certain objects for which the said Company was established, and upon that part of the high seas before mentioned, and the said Company did then and there, by their mariners and servants, commit the grievances in the declaration mentioned; and that the defendant never was possessed of or interested in the said ship otherwise than as such holder and proprietor of shares: and that, by the law of France, the defendant was not, at the time of the committing of the grievances, or from thence hitherto, *responsible for or liable to be sued or impleaded individually*, or in his own name or person, in respect of the causes of action in the declaration mentioned, but the said Company alone, by their said style or title, or the master or person in command of the ship for the time being, was responsible for and liable to be sued and impleaded for the said causes of action; and that the defendant never was master, or in command of the said ship.

Held, that, if this plea was to be construed as meaning to aver, that by the law of France the defendant was not liable for the acts of the master, but that a body established by that law, and in the nature of an English corporation, were the proprietors of the vessel, and alone liable for the acts of the master, the plea was a good defence to the action: but if the plea meant only, that in the French courts the mode of proceeding would be to sue the defendant jointly with the other shareholders of the Company, under the name of their association, the plea was bad. The Court were divided in opinion which was the proper construction of the plea; Lord Abinger, C. B., and Alderson, B., adopting the latter construction; and Parke, B., and Gurney, B., the former.

The defendant pleaded also (after the same averments as to the place of the injury, the

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of by a ship or vessel of the defendant's, then being under the care, direction, and management of certain mariners and servants of the defendant, whereby the plaintiffs' vessel was sunk.

Third plea: that the said ship or vessel, in the declaration secondly mentioned, ran foul of the said ship or vessel of the plaintiffs, as in the declaration mentioned, upon a certain part of the high seas, situate between the kingdoms of England and France, and without the jurisdiction or dominions of the Queen of Great Britain, and not elsewhere: and that at that time, and from thence continually hitherto, the defendant was, and still is, a subject of his Majesty the King of the French, and not a subject of the Queen of Great Britain: and the defendant, then being a subject of the King of the French, was a holder and proprietor of shares in, and acting director of, a certain society or company theretofore duly established in France by royal ordinance, according to the laws and customs of the king-

defendant's being a subject of France, and a member of the Company, &c.) that the Company, for the recovery of the damages sustained by them by the negligence and mismanagement of the plaintiffs of their said ship, sued and prosecuted, according to the law of France, a writ of summons to the plaintiffs, whereby they were required to appear before the Court of the Commercial Tribunal of Havre on a certain day, in order that the said Court might inquire whether, on the day in the declaration mentioned, the said ship of the plaintiffs did, by the negligence and mismanagement of their officers or crew, run on board of the said ship of the Company, whereby she was sunk, and to hear themselves condemned in person and goods, &c. &c.; the said Court having jurisdiction over the said cause and the matters therein arising. The plea proceeded to state, that the plaintiffs accordingly appeared in the Court at Havre, and defended themselves against the claim of the Company, and insisted that the collision proceeded from the negligence of the servants of the defendant, as in the declaration mentioned; and that the Court adjudged that the plaintiffs' ship did, by the negligence of the plaintiffs by their officers and crew, run on board of and sink the said ship of the Company, and condemned the plaintiffs in damages: and alleged, that the said several matters of defence so insisted on by the plaintiffs in the Court at Havre, and the grievances in the declaration mentioned, were the same identical causes of defence and matters of grievance, and that the very identical question, whether the defendant, by his mariners and servants, was guilty of the grievance in the declaration mentioned, arose and became material in the said suit in the said Court at Havre; and being there examined into, it was adjudged by the said Court, having jurisdiction in that behalf, that neither the defendant nor the Company, by his or their mariners or servants, was or were guilty thereof. The plea then averred, that by the law of France, the judgment so recovered in the French Court was an absolute and final bar to any action by the plaintiffs against the defendant in respect of the grievances and causes of action in the declaration mentioned.

Held, that the plea was bad in form, for not commencing and concluding by way of estoppel; and in substance, for not shewing that the plaintiffs were French subjects, or resident or present in France when the suit at Havre was commenced, so as that they might be bound, by reason of allegiance, or domicile, or temporary presence, by a decision of the French Court.

Quære, whether, even with such allegations, the plea would have been a bar to the action.

dom of France, by the name of "La Compagnie des Paquebots à Vapeur entre Le Havre et Londres," meaning &c., and that at the time the said ship or vessel in this plea mentioned so ran foul of and struck against the said ship or vessel of the plaintiff, as in the declaration mentioned, the said company, then and from thence hitherto and still being subjects of the King of the French, were the owners and proprietors of the said ship or vessel, and by their mariners and servants in that behalf, were then lawfully navigating the same as subjects of the King of the French, for certain objects and purposes for which the said society or company was, amongst other things, established as aforesaid, and upon that part of the high seas in this plea first mentioned, and not otherwise or elsewhere; and the said company did then and there, by their said mariners and servants, commit the said grievances in the declaration mentioned; and that the defendant never was possessed of or interested in the said ship or vessel in this plea first mentioned, otherwise than as such holder and proprietor: and the defendant further says, that, by the law of France, as established within that kingdom, the defendant was not, at the time of the committing of the grievances &c., or at any time from thence hitherto, responsible for or liable to be sued or impleaded individually, or in his own name or person, in any manner whatsoever, in respect of the said causes of action in the declaration mentioned, or any of them, but that, by the law of the said kingdom of France, the said company alone, by their said style or title, or the master or person in command for the time being of the said ship or vessel, was, during all the time aforesaid, responsible for, and liable to be sued or impleaded for, the said several causes of action: and the defendant further says, that he never was master or the person for the time being in command of the said ship or vessel.—Verification.

Fourth plea: that, at the time of the committing of the said grievances &c., the said ship or vessel in the declara-

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tion secondly mentioned was in the actual possession of the said mariners and servants in the declaration mentioned, as the mariners and servants of the defendant and others, who were then subjects of the King of the French, associated together by a royal ordinance, for the purposes of steam navigation between France and Great Britain, by the name and style of &c.: that the said grievances in the declaration mentioned were done and committed by means and in consequence of the said ship or vessel of the plaintiffs and the said ship or vessel in this plea first mentioned coming into collision with one another, and striking against and running foul of each other, upon the high seas separating the kingdoms of England and France, and in that part thereof which is not within the jurisdiction or dominions of the Queen of Great Britain: and the defendant further says, that, after the committing of the said grievances, and before the commencement of this suit, to wit, on the 4th November, A. D. 1840, the said Company, for the recovery of the damages by them sustained by reason of the negligence and mismanagement of the plaintiffs of their said ship or vessel, in coming into collision with the said ship or vessel in this plea first mentioned, &c. sued and prosecuted, according to the law and custom of the kingdom of France, a certain writ of summons, directed to the plaintiffs, whereby they were required to appear before the Court of the Commercial Tribunal of Havre, at Havre aforesaid, at their usual place of sitting, at ten o'clock in the forenoon of Saturday, the 9th day of January, A. D. 1841, in order that the said Court might then and there inquire whether, on the day and year in the declaration mentioned, the said ship or vessel of the plaintiffs did, by the negligence and mismanagement of their captain or officers and crew, run on board of the said ship or vessel in this plea first mentioned, whereby the said last-mentioned ship or vessel was immediately sunk, as affirmed by the captain and crew of the said last-mentioned ship or vessel, and to hear themselves condemned in person and goods, and

especially the said ship or vessel of the said plaintiffs in the declaration mentioned, and to pay to the said company the sum of 700,000 francs, together with interest and costs, the said Court at Havre then and from thence hitherto having jurisdiction over the said cause, and the matters therein arising: and the defendant further says, that afterwards, and before the commencement of this suit, to wit, on the 9th day of January, A. D. 1841, the plaintiffs appeared in the said Court at Havre aforesaid, in pursuance of the said last-mentioned summons, and then and there defended themselves against the said charge and claim of the said Company, and by way of defence thereto, then and there insisted, before the said Court at Havre aforesaid, that the said collision and running foul of the said ship or vessel in the declaration mentioned, had proceeded from the carelessness, misdirection, and mismanagement of the mariners and servants of the defendant, as in the said declaration mentioned; and that such proceedings were thereupon had in the said Court at Havre aforesaid, upon the said summons, that afterwards, and before the commencement of this suit, &c., to wit, on the 24th April, 1841, it was considered and adjudged in and by the said Court, that on the day and year in the declaration mentioned, the said ship or vessel of the plaintiffs did, by the negligence and mismanagement of the plaintiffs, by their captain, officers, and crew, run on board of the said ship or vessel of the said company, being the said ship or vessel in the declaration secondly mentioned, whereby the said last-mentioned ship or vessel was immediately sunk; and the said Court did then and there further order and adjudge that the plaintiffs should pay to the said Company, for their damages which they had sustained by reason of such running on board of and sinking their said ship or vessel as aforesaid, the sum of 700,000 francs of lawful money of France, together with their costs of suit; as by the proceedings of the said Court, reference being there-

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unto had, will amongst other things more fully appear. And the defendant further says, that the said judgment of the said Court at Havre aforesaid is still in full force and effect, not reversed, annulled, or otherwise vacated: and the defendant further says, that the said several matters of defence so by the plaintiffs insisted upon as aforesaid, in the said Court at Havre aforesaid, and the said several grievances in the declaration mentioned, were and are the same identical causes of defence and matters of grievance, in the said suit in the said Court at Havre aforesaid, and in the said declaration in this cause mentioned, and not other or different; and that the very identical question, whether the defendant, by his mariners and servants aforesaid, was guilty of the said several grievances in the declaration in this cause mentioned, or any of them, arose and became material in the said suit in the said Court at Havre aforesaid, and the same being then and there examined into, it was then and there adjudged and decided, in and by the said Court at Havre aforesaid, (the said Court then and there having jurisdiction in that behalf), that neither the defendant nor the said company, by his or their mariners or servants, was or were guilty thereof; and the defendant further says, that by the law of the said kingdom of France, the said judgment, so recovered as in this plea mentioned, was and is an absolute and final bar and preclusion to and against any action or suit by the plaintiffs against the defendant, for or in respect of the said several grievances and causes of action in the declaration mentioned, or any of them.—Verification.

The fifth plea differed from the fourth only in describing the judgment of the Court of Havre as being a judgment in the alternative, that the plaintiffs should pay the Company 700,000 francs for damages, or should surrender and abandon to them the plaintiff's vessel, in satisfaction of the damages, according to the law of France.

Replication to the third plea, that the defendant, at the time of the committing of the grievances &c., was pos-

essed of and interested in the said ship or vessel in the plea first mentioned, otherwise than as such holder and proprietor of shares in and director of the said Company, as therein mentioned; and that, by the law of France, as established within that kingdom, the defendant was, at the time of the committing of the grievances &c., and from thence hitherto, responsible for and liable to be sued and impleaded individually, in his own name and person, in respect of the causes of action in the declaration mentioned; concluding to the country.

Special demurrer to the fourth plea, assigning for causes, that the said plea does not confess or avoid the matters and allegations contained in the declaration, but is an indirect and circuitous traverse that the defendant was guilty of any of the grievances therein mentioned: that the said plea amounts to the general issue, and ought to have concluded to the country: that it sets forth only matters of evidence, and not any matter of law, in bar of this action, but attempts, by way of supposal and inference only, to deny the allegations and charges in the declaration: that if the said plea confesses that the damage to the plaintiffs' vessel happened, as therein alleged, from the carelessness and breach of duty of the defendant, it must also be taken to admit that the judgment of the Court at Havre was erroneous, and contrary to the facts; and if, on the other hand, the plea does not admit the allegations in the declaration to be true, it is bad, as not being a plea in confession and avoidance: that the said plea contains no proper commencement or conclusion; and that it is argumentative, and seeks to put in issue matters wholly immaterial to the merits of the action.

There was also a demurrer to the fifth plea, assigning similar causes.

Special demurrer to the replication to the third plea, assigning for causes, that it is double and multifarious, and contains two distinct answers to the plea, either of which

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would, if true, be a sufficient answer; viz., first, that the defendant was interested in the vessel otherwise than as a holder and proprietor of shares in, and director of the said company; and secondly, that he was, by the law of France, responsible for, and liable to be sued and impleaded &c., for the causes of action in the declaration mentioned, &c., &c.

Joinders in demurrer.

The plaintiffs stated the following points for argument, in addition to those set forth in their demurrer.

On the demurrer to the fourth and fifth pleas:—that a judgment in a foreign court is not a bar to an action here for the same cause: that it does not appear from the pleas that the same matters were in issue in the foreign court which are involved in this action, or that the judgment was upon the questions now litigated; and that the plea, not being pleaded by way of estoppel, cannot be relied on as any answer in law to this action.

On the argument of the defendant's demurrer to the replication: that the third plea is no answer in law to the declaration, inasmuch as the defendant admits, that at the time of the collision he was in the possession of the vessel in the declaration secondly mentioned, jointly with the other shareholders in the company mentioned in the third plea, and that the mariners and servants in whose actual control the vessel was, were the mariners and servants of the defendant and his co-proprietors. The form, therefore, in which the company or its members would be impleaded in France is not material, being a question respecting the mode of remedy, and not the right, and one which is governed by the laws of the country where the action is brought.

The plaintiffs will also object, that the third plea does not state or shew that the French company therein mentioned is a corporation, or that it could be sued by its style or title in this country, and if the present action cannot

be sustained against a member of the company, the plaintiffs will be without remedy, as they cannot sue the French company by its style or title in English courts. It will also be contended, that the matter of the third plea, if receivable at all, is rather matter in abatement than in bar, and no answer to the present proceedings.

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Also, that the third plea does not shew any reasons why the rights of the parties are to be decided by the law of France, as the collision did not occur within the jurisdiction of the French King. On the contrary, it appears from the plea, that it took place within the dominions of the Crown of England, and the jurisdiction of the English courts.

The defendant's points were as follows :—

The defendant will contend that the fourth plea does not amount to the general issue, and that the several matters therein alleged could not be given in evidence under the plea of not guilty; that it contains facts material to the merits of the action, and that the facts therein alleged are a complete bar to the action; and that in all respects the plea is well pleaded.

The defendant will contend that the fifth plea is good in law, for the like reasons.

The defendant will also contend that the replication to the third plea is double, &c. &c.: that it is an argumentative denial of the plea, whereas the proper replication would have been *de injuriâ* generally, or, admitting some of the facts stated in the plea, *de injuriâ absque tali causâ*.

The case was argued in last Hilary Term (Jan. 16), by

The *Solicitor-General*, for the plaintiffs.—First, the third plea is clearly bad in substance. It amounts to saying merely that the plaintiffs have no right to sue the defendant *individually*. It does not deny that the mariners and servants, through whose negligence the injury is alleged to

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have occurred, were *his*. [Lord *Abinger*, C.B.—If it means to allege that the defendant is a member of a *corporation*, which ought to have been sued as such, the plea amounts to the general issue.] Again, the plea does not allege that the collision took place within the jurisdiction of the King of the French, or that the defendant was domiciled in France. He might be domiciled in England, and resident here, although a French subject. The plea, moreover, admits that the defendant was an owner, in common with the other members of the company. And if it be taken to allege that the company is a *corporate body*, it is bad, because the plaintiffs could not sue a foreign corporation in the courts of this country, and therefore are left without remedy, if the defendant be not individually responsible. The rule of law is, that whatever goes merely to the mode of *remedy* for a wrongful act, is to be adjudged on according to the *lex fori*. Story on the Conflict of Laws, ch. 14, ss. 556, 557.

The fourth and fifth pleas are also bad, for the reasons stated in the demurrer book. In the first place, they are clearly bad on special demurrer, as not being properly pleaded by way of estoppel. A plea is not good by way of estoppel, unless it commences and concludes properly, by relying upon the estoppel; 1 Saund, 325, a.; Bac. Abr., Pleas, (B. 11); Vin. Abr., Estoppel. Secondly, the pleas do not shew that the decision of the Court at Havre was a judgment on the matter in issue upon this record, or that the question now in dispute, viz., whether the defendants were guilty of negligence in the navigation of their vessel, was litigated in that Court. [*Alderson*, B.—The whole judgment set out is, that there was negligence in the plaintiffs; and it is only matter of *inference* that the defendant had judgment on his defence, that he was not guilty of negligence.] Thirdly, the judgment of a foreign Court, even if it be directly upon the matter in question, is no *bar* to an action for the same cause in the Courts of this

country. That was settled in the case of *Houlditch v. Marquis of Donegal* (a), in the House of Lords. In that case the Lord Chancellor says (b)—“Upon one point the law is perfectly clear; the judgment of a Court of Record of the country where any action is brought is conclusive between the parties and privies to that record. It is equally clear, that the judgment or decree of a Court of Record of a foreign country, or a court in the nature of a Court of Record, may be made the ground of a proceeding in the Courts of this country; . . . and one question which arises in this case, and which has been made a point of on both sides, is one which has been raised in some of our Courts, in which there have been dicta, with some authority of judicial decision, but conflicting dicta, upon the point, namely, whether it is only *primâ facie* evidence, or ground of an action, or conclusive, not to be traversed or rebutted, and not to be averred against. The leaning of my opinion is so strong, that I can hardly call it the inclination of an opinion; and we know it is the general sense of lawyers in Westminster Hall, (notwithstanding dicta of considerable weight coming from very learned Judges, obiter dicta, to the contrary), that the judgment of a foreign Court in Courts of this country is only *primâ facie* evidence—is liable to be averred against, and not conclusive.” His Lordship then proceeds to give his reasons at length for this opinion; and afterwards, on finally delivering the judgment, he says, (c) “I entered very much at large into my views of this case when the argument closed. I stated that it appeared to me quite impossible that I should accede to the proposition that a judgment in one country, pronounced by a Court of competent jurisdiction, could be used in another, as conclusive of the matter.” And his Lordship states it as his confirmed opinion, “that a judgment may be given in evidence, and made the subject of proceedings in another

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(a) 8 Bligh, N. S. 301.

(b) P. 337.

(c) Pp. 345, 346.

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Court, in a foreign country; but that, although it may be made the ground of that proceeding, it may be met by contrary evidence, and the subject matter of the judgment is liable to be inquired into (a).” By the law of France, also, judgments of foreign Courts are capable of execution in that country, but the merits of the judgment are examinable there, whether it was a suit between Frenchmen, or between a foreigner and a Frenchman (b). These are, in truth, no more than pleas of evidence, although of what may be said to be strong evidence. But, at all events, they do not shew a judgment upon the point now in dispute: the utmost it comes to is that which might occur at nisi prius here, that the defendants in the foreign suit set up the plaintiff’s negligence as an answer. That would be no bar to a new action in this country. The suit in France was not instituted by the present plaintiffs, but against them; they were not, therefore, the actors in the foreign Court, but were taken there unwillingly. Then all that is alleged to have been adjudged is, that there was negligence in them; and there is no statement of the proceedings in the French Court, or what were the issues in this suit. The pleas do not aver that there was an issue distinctly joined, on which the Court adjudicated. There is no finding on the matter which is the subject of discussion on this record, viz., the now defendant’s negligence. The collision with his ship may have been the plaintiffs’ fault, but the sinking of their ship his fault.

Kelly, for the defendant.—The third plea is good, at least on general demurrer. The question which was intended to be raised by that plea is, whether an individual member of a foreign corporation can be made liable for an injury done on the high seas by a servant of the corpora-

(a) See Mr. Justice *Story’s* note 864, n.
on that case, *Conflict of Laws*, p.

(b) *Story*, p. 872, s. 617.

tion. It sufficiently appears, on the face of the plea, that this is a foreign corporation, or of what we in our law call a corporation. [Lord *Abinger*, C. B.—We do not know what a corporation means in France.] If it appear that the defendant is a member of a company which has in France the same incidents and immunities as a corporation has in England, that is sufficient. The plea could not state in express terms that it was a French *corporation*, because the defendant could not tell what meaning the Court would put upon that term. [*Alderson*, B.—The defendant does not say that the ship was not his property. Lord *Abinger*, C. B.—The statement in this plea would not amount to an allegation that this was a corporation in this country. The defendant should have denied that he had any individual property in the ship, whereas all that is stated is, that he had no interest but as a partner in the company.] Substituting the word “corporation” for “company,” it would be a good plea of liability in a corporation in England: and there is no such word as “corporation” in France. [*Parke*, B.—We are now on general demurrer to the plea: then the question is, whether it sufficiently shews that the defendant has no property in the ship, and therefore is not liable, but that the company, of which he is a member, is alone liable; and what the effect of that is, as to a wrong done on the high seas, which is the highway of nations.] That is the question. The defendant is sought to be made liable only by inference of law, and that lets in the question how far he is liable being a subject of France. It is difficult to see how otherwise the defence could have been pleaded, except by the introduction of the word “corporation,” which would solve the difficulty as to England, but only creates one as to France. The defendant is only sought to be made liable as owner, for the act of his servant; he may be so liable in one country, but not in another: then the plea alleges that the defendant is not responsible, or liable to be sued

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individually, in his own name or person, but that the company alone, by their name, are liable to be sued. *Trimbey v. Vignier* (a) somewhat resembles this case. There a promissory note was made by the defendant in France, and indorsed in blank by the payee in that country, the maker and payee being domiciled there; and it was held, that as no action could have been maintained in the French Courts of law in the name of the payee, (the indorsement, according to the law of France, operating as a procuration only, and not as a transfer), so no action could be maintained by him in our Courts. It might have been said there, that the defendant was liable in this country by reason of the law merchant. There are several cases in which the question has been considered, how far the rights of foreign companies or corporations are recognized in England, and in all of them the law of this country has been governed by the law of that in which such companies existed: *Dutch West India Company v. Van Moses* (b), *Henriques v. Dutch West India Company* (c), *National Bank of St. Charles v. De Bernales* (d), *Alivon v. Furnival* (e). The authorities on this subject are collected in the last edition of Story on the Conflict of Laws, p. 811; where the general principle is laid down, that, "in regard to the merits and rights involved in actions, the law of the place where they originated is to govern; but the forms of remedies, and the order of judicial proceedings, are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right, or the country of the act." Thus, where a defendant was held to bail in this country on an instrument entered into in France, and by which his property only, and not his person, was, according to the law

(a) 1 Bing. N. C. 151; 4 M. & Scott, 695.

(b) 1 Stra. 612.

(c) 2 Ld. Raym. 1532.

(d) Ry. & M. N. P. C. 190.

(e) 1 C., M. & R. 277.

of France, made liable, the Court discharged him on motion: *Melan v. Duke de Fitzjames* (a). There *Eyre*, C. J., says, "If it appears that this contract creates no personal obligation, and that it could not be sued as such by the laws of France, there seems to be fair ground on which the Court may interpose to prevent a proceeding so oppressive as a personal arrest in a foreign country, in a case which, as far as we can judge at present, authorizes no proceeding against the person in the country in which the transaction passed . . . I cannot conceive that what is no personal obligation in the country in which it arises, can ever be raised into a personal obligation by the laws of another." Here the defendant becomes an owner merely by taking shares in the company, which is done under the French law. It is only through a *contract* that he is made liable as a tort-feasor, which makes the case precisely analogous to that of *Trimbey v. Vignier*. Suppose the master of this vessel, at sea, had entered into a contract for necessities for the vessel, and an action were brought for the price of them against the defendant, charging him as owner; the plaintiff must have given evidence of the contract under which the defendant became a member of the company, which was entered into in France, and under the French law. And if there be any distinction between a case of contract or of tort, it is a distinction in favour of the defendant, who is charged here for a *wrong* to which he is no party, merely as being a member of this company, and therefore, it is said, the owner of the vessel. *Holman v. Johnson* (b) shews, that the Court will look to a contract made abroad, to determine the liability of the defendant. A *crime* committed in a foreign country against an Englishman, by a foreigner, though he was then acting as a mariner on board an English ship, was held not to be cognizable in this country: *Rex v. Depardo* (c). On the

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(a) 1 Bos. & P. 138.

(b) Cowp. 341.

(c) 1 Taunt. 26.

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With respect to the fourth and fifth pleas, we all agree that they are bad in form; and the objection, being pointed out on special demurrer, must prevail. These pleas contain no answer to the declaration by way of denial, or confession and avoidance, but are pleaded in the nature of an estoppel. The substance of the plea is, that the cause of action has been already adjudicated upon, in a competent Court, against the plaintiffs, and that the decision is binding upon them, and that they ought not to be permitted again to litigate the same question. Such a plea ought to have had a proper commencement and conclusion, "that the plaintiffs ought not to be admitted to say that the defendant was guilty:" as in the case of *Plummer v. Woodburne (a)*, in which a foreign judgment was pleaded by way of estoppel.

It becomes, therefore, unnecessary to give any opinion whether the pleas are bad in substance; but it is not to be understood that we feel much doubt on that question. They do not state that the plaintiffs were French subjects, or resident, or even present in France, when the suit began, so as to be bound by reason of allegiance, or domicile, or temporary presence, by a decision of a French Court; and they did not select the tribunal and sue as plaintiffs; in any of which cases the determination might have possibly bound them. They were mere strangers, who put forward the negligence of the defendant as an answer, in an adverse suit in a foreign country, whose laws they were under no obligation to obey.

The fourth and fifth pleas are, therefore, both bad, and our judgment upon the demurrer to them must be for the plaintiffs.

With respect to the third plea, the difficulty the Court

(a) 4 B. & C. 625.

have had is, to determine its meaning, the language used being obscure, perhaps purposely so.

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The injury complained of is averred to have arisen on the high seas, out of the jurisdiction of England, and not to have been committed by the defendant personally, but by a third person, who was master of a French vessel, the defendant being a French subject. So far the plea is free from obscurity. If the defendant was not liable for the acts of that other by that law which is to govern this case, he has a good defence to the action; and, for the defendant, it is contended that the plea means to aver that, by the law of France, he was not liable for those acts, but that a body established by the French law, and analogous to an English corporation, were the proprietors of the vessel, and alone liable for the acts of the master, who was their servant, and not the servant of the individuals composing that body; and, if such be the true construction of this plea, we are all strongly inclined to think that there is a good defence to this action. On the other hand, the plaintiffs contend, that the plea only means, that in the French Courts the mode of proceeding would be to sue the defendant jointly with the other shareholders of the company under the name of their association: and, if this be the true construction of the plea, we all concur in the opinion that the plea is bad; for it is well established, that the forms of remedies and modes of proceeding are regulated solely by the law of the place where the action is instituted—the *lex fori*; and it is no objection to a suit instituted in proper form here, that it would have been instituted in a different form in the Court of the country where the cause of action arose, or to which the defendant belongs: *De la Vega v. Vianna* (a); Story on the Conflict of Laws, s. 556.

On the question as to the true construction of the plea, we have entertained much doubt, and are not ultimately agreed.

(a) 1 B. & Adol. 284.

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My Lord *Abinger*, and my Brother *Alderson*, think that, construing the plea most strongly against the defendant, it means only that the defendant ought to be sued jointly with his co-owners, and in the name of the society. My Brother *Gurney* and I think, certainly not without some doubt, that it must be construed to mean that the defendant is not individually responsible, that is, liable in any way for the acts of the master by the law of France.

This difference is of little importance to the ultimate decision of the case. There can be no judgment upon the demurrer; but if the plea is to be understood in the sense which my Brother *Gurney* and I ascribe to it, the same defence will be open on the general issue.

Judgment for the plaintiffs on the demurrers
to the fourth and fifth pleas.

July 10. HEAP and Another, Executors of Joseph Heap, deceased,
v. LIVINGSTON and Another.

To a declaration in covenant, by the executors of a lessor against the assignee of the lessee, the defendant pleaded in abatement, that the estate, &c., of the lessee vested by assignment in the defendants jointly with B., who became, and from thence until &c., continued to be such as-

COVENANT by the executors of a lessor against the assignees of the lessee. The declaration stated, in substance, that Joseph Heap, since deceased, being possessed of a certain messuage or tenement and premises, demised the same to John Shaw, by an indenture whereby Shaw covenanted for the payment of rent and the repair of the premises; it then stated the death of Joseph Heap, having made the plaintiffs his executors; and that all the estate, right, title, and interest of the said John Shaw vested in the defendants by assignment. Breaches, nonpayment of the rent, and non-repair.

signee, jointly liable with the defendant to perform the covenants, and that the breaches of covenant were committed by the defendant jointly with the said B.:—*Held* bad on demurrer, for not stating the mode in which B. became assignee jointly with the defendant.

The defendant Livingston pleaded in abatement, that the estate, right, &c. of the said John Shaw vested by assignment in the defendants jointly with one John Brammall, who became, and from thence until, &c. continued to be such assignee, jointly liable with the defendants to perform the said covenants, and that the said several breaches of covenant were committed by the defendants jointly with the said John Brammall.

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Special demurrer, assigning for cause, that the mode in which the assignment was made being within the defendant's cognizance, he ought to have shewn with particularity how the assignment was made, whether by deed or otherwise, that the Court might see if the estate did legally vest in Brammall jointly with the two defendants, and that the defendants might be able to craveoyer of any deed, and might know how to be able to fix Brammall in another action.—Joinder in demurrer.

Cleasby argued in support of the demurrer (June 27).—This plea is bad for uncertainty. There is undoubtedly no precedent of a plea in abatement in which the defendants' whole title is set out; although, upon principle, there does not seem to be any reason why it should not be stated in a plea in abatement, as well as in a plea in bar. But here the defendants are charged as assignees of the term; and, in order to render this defence sufficient, the plea certainly ought to have shewn in what manner Brammall became jointly liable with them, in order to give the plaintiffs a remedy against him. The rule as to the allegation of title in pleading is thus laid down in *Stephen on Pleading*, 350 (4th ed.): "The rule on this subject appears in general to be, that it is not necessary to allege title more precisely than is sufficient to shew a liability in the party charged, or to defeat his present claim. Except as far as these objects may require, a party is not compellable to shew the precise estate which his adversary holds, even in

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J. W. Smith, contra.—First, this plea is sufficient on principle. The same subject-matter of defence might have been raised by a plea in bar: the defendant, instead of pleading in abatement, might have taken issue on the allegation in the declaration, that the estate of Shaw vested in the defendants by assignment, and the plaintiff could not have succeeded on that issue, unless he shewed that the *whole* vested in the defendants alone: *Hare v. Cator* (a). The plaintiffs, therefore, are benefited rather than prejudiced by this plea, for they obtain more information by it than if there had merely been a traverse of that averment in the declaration, and now get a better writ, which in that case they could not have done. The plea may possibly amount to an argumentative traverse, but that is not made a ground of demurrer. The plaintiffs may now bring a fresh action, and will have costs against the defendants

(a) Cowp. 766.

under the stat. 3 & 4 Will. 4, c. 42, s. 10, if they have pleaded the plea falsely. Secondly, the authorities, so far as any are to be found upon this point, appear also to be in favour of the sufficiency of the plea; and it is admitted that there is no precedent of a plea in abatement in which the title is more fully set out than here. The case of an executor pleading in abatement is rather an authority in favour of the defendants; for it is said in Com. Dig. Abatement, (E. 10), that "the plea that there is another executor not named is good, though it does not say that the will is proved:" and so is the precedent in 1 Wentworth, 58. [*Parke, B.*—Because the executor derives his title from the will, and not from the probate.] If the rule were to be so strict as is contended for by the plaintiffs, it might often be productive of much inconvenience and hardship. A joint-tenant may be able to set out his title with precision, but a tenant in common may have acquired his title after many mesne assignments, and may know nothing whatever of the title of his co-tenants.

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Cleasby, in reply.—There can be no hardship in either case in requiring the defendant to set out his title fully. If he is a joint-tenant, he is seised per my et per tout, and may therefore be reasonably expected to know the title to the whole premises. And if he is possessed as a tenant in common, he is at least bound to shew his own title, though he may not know that of his companions. [*Parke, B.*, mentioned *Curtis v. Spitty* (a), as confirming *Hare v. Cator*.]

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—In this case the defendant pleads in abatement the non-joinder of another joint tenant, as joint

(a) 1 Bing. N. C. 756; 1 Scott, 737.

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assignee of the term, and the objection, on special demurrer, is that the plea does not state his title specially. We are of opinion that this objection is good.

The general form of pleading is allowed to the plaintiff, because he cannot be presumed to know the particulars of the defendant's title. The reason ceases, where the defendant pleads his own title as joint tenant, for he must be presumed to know how he became such. On principle, therefore, the plaintiff's objection is well founded.

There are no precedents precisely in point; but there are some which afford a strong analogy. In real actions, where the defendant pleads joint tenancy of his own part, he ought to shew by whose feoffment: *Dyer*, 32 a, and *Com. Dig. Abatement*, (F. 5); and in actions against an executor, a plea of abatement of non-joinder states that the testator made his will, and appointed the defendant co-executor: *Brownl. Red.*, 199 and 200.

It was argued by the plaintiffs' counsel, that this was properly a plea in bar, and was good in substance; and if it was so, the defendant might avail himself of it, there being no special demurrer on the ground that it was an argumentative traverse of the averment that all the estate vested in the defendant by assignment. And the case of *Hare v. Cator* was cited, to which may be added *Curtis v. Spitty*, where the Court of Common Pleas held, that if the defendant was assignee of part of the land only, he was entitled to a verdict on the issue that all the estate did not vest in him by assignment, contrary to the dictum of Mr. Justice *Holroyd*, in *Merceron v. Dowson* (a). But in this case the defendant does not take *part* of the estate; he is seised per my et per tout in the whole; and the cases cited do not apply. His plea is properly pleaded in abatement; but for the reason before given, is bad in form.

Judgment for the plaintiff of respondeant ouster.

(c) 5 B. & C. 484; 8 D. & R. 364.

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July 10.

LOCKE and Others v. JAMES.

THIS was an action of trespass for breaking and entering the plaintiffs' close, and seizing the cattle of the plaintiffs, which trespasses the defendant justified as a distress for the arrears of an annuity of £600, alleged by her plea to have been granted to her by the will of one Ralph Nicholson the elder, and to be thereby charged upon and payable out of certain lands, of which the close on which the distress was made was parcel.

The plaintiffs traversed that such annuity of £600 was so granted and charged, and thereon issue was joined; and as the proper finding of that issue depended on a question of law, the parties agreed that judgment should be entered in pursuance of the 25th section of the 3 & 4 Will. 4, c. 42, according to the opinion of the Court upon the following facts:—

October 18th, 1828.—The said Ralph Nicholson the elder, by his will of this date, and which was duly signed and attested according to the law as it then existed, so as to pass and charge real estates, after directing, in the first place, that all his just debts, and funeral and testamentary expenses, should be paid and satisfied, proceeded as follows:—"I give, devise, and bequeath all my estates situate in the parishes of Utting and Langford, and of Woodham-Ferris, all in the county of Essex, unto my son Ralph Nicholson, his heirs and assigns for ever, subject to and charged with the payment of an annuity or clear yearly sum of six hundred pounds, which I give to my daughter Elizabeth James for and during her natural life, to be paid to her by equal half-yearly payments, from the first of the usual quarter days after my death, but without any anticipation or assignment of the growing payment thereof, for her sole use and benefit, independent of any future husband, and so as not to be subject to his debts, engagements, or

A testator, by his will duly executed, devised certain real estates to R. N. in fee, subject to and charged with an annuity of six hundred pounds a year, which he gave to his daughter E. J. for her life, with powers of distress and entry on the devised estates, in case the annuity were in arrear. He subsequently erased with a pen the word "six," and inserted over it the word "two," leaving however the word "six" legible, in each place where it occurred; and on the same day he added a memorandum or codicil to his will, signed by him in the presence of one witness only, recognizing the above alterations.

Held, that the substitution of "two" for "six" hundred was, under these circumstances, inoperative, and that E. J. retained a legal interest in the annuity of £600.

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control, so that her receipt may from time to time be a good and sufficient discharge from the same."

The will then contained a declaration, that when and so often as the said annuity of £600, or any part thereof, should be in arrear for one calendar month after any of the days of payment, it should be lawful for the said Elizabeth James to take and distrain upon any part of the premises so charged with the payment thereof, for the purpose of satisfying the arrears of the said annuity; and by the said will power was also given to the said Elizabeth James, in the event of the said annuity of £600 being in arrear after any of the days of payment, to enter upon the premises so charged with the payment thereof, and to hold the same, and to receive the rents, until she should be fully satisfied the arrears of the said annuity. And after other bequests and dispositions, the testator, as to all the rest, residue, and remainder of his estate, after payment of his just debts, funeral and testamentary expenses, and the legacies and annuities thereinbefore bequeathed, and the duty payable in respect thereof, gave and bequeathed the same unto his son Ralph Nicholson, his heirs, executors, administrators, and assigns.

15th August, 1830.—On this date the testator erased with his pen the word "six," in each case where it occurred in the said will with reference to the said annuity therein-mentioned to have been given to the said Elizabeth James, and inserted over the same the word "two," leaving, however, the word "six" still legible in each case where it had originally occurred; and on the same day he added a memorandum or codicil to his will, signed by him in the presence of one witness only, referring to the said alterations as follows:—"The alterations in the first sheet and in the second sheet, all relating to the said annuities left to my daughter Elizabeth James and her children, were made by me the 15th of August, 1830. Witness my hand, Ralph Nicholson."

The testator added two other memoranda by way of codicils to his said will, the first bearing date the 1st of February, 1831, and the other without a date, neither of which were attested; the first stating that he had cancelled the legacies to his executors, and referring to the obli-
 terations in sheet 5 to that effect; and the other refer-
 ring to the appointment of an additional executor; and
 also a third memorandum by way of codicil, signed by
 him, but without date and unattested, by which he stated
 that he had cancelled the annuity he bequeathed to Edward
 Thomas, in sheet 2 in the said will.

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16th December, 1831.—The testator died without fur-
 ther altering his will, and the same was proved by all the
 executors therein named, in the Prerogative Court of the
 Archbishop of Canterbury, on the 30th of the same month.
 The personal estate of the testator is sufficient to pay his
 debts, and the annuity or yearly sum of £600, originally
 mentioned in the said will, and also all other annuities and
 legacies bequeathed thereby. The plaintiffs are the devi-
 sees in trust, under the last will and testament of Ralph
 Nicholson the son, referred to in the above-mentioned will,
 of the lands and hereditaments devised to him by the said
 will of Ralph Nicholson the elder, including the close in
 question.

Either party may produce at the argument the will itself
 and codicils, and which may be read and referred to as part
 of the special case. The question for the opinion of the
 Court is, whether the said Elizabeth James is entitled,
 under the will of Ralph Nicholson the elder, to an an-
 nuity of £600, charged upon the lands therein mentioned,
 to be devised to Ralph Nicholson, the son, or to an annuity
 of £200 only, under the said will and codicils thereto,
 charged upon the said lands.

If the defendant Elizabeth James is entitled to an an-
 nuity of £600 charged upon the above-mentioned lands,
 then judgment is to be entered for the defendant; if not,

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judgment is to be entered for the plaintiffs, with 40s. damages.

The case was argued in the course of these sittings (June 23), by

Martin, for the plaintiffs.—The effect of the will and codicil is, that an annuity of £200 only is charged upon the real estate, in favour of the defendant. The case of *Bootle v. Blundell* (a) establishes, that where a testator dies possessed of personal as well as real estate, the personalty is the primary fund to which to resort for the satisfaction of legacies, although they are charged by the will upon the real estate. And *Fitzgerald v. Field* (b) is an express authority that the same rule is applicable to annuities as to legacies, in this respect. This is, in truth, merely a bequest out of the personalty, with the right to resort to the real estate in aid of it: *Bickham v. Cruttwell* (c).

Then, inasmuch as the alteration in the amount of the annuity is made by a codicil which, for want of a sufficient attestation, cannot operate as a devise of the real estate, the rule as to principal and accessory applies; the principal being gone, the accessory, the remedy against the land, is gone also, and such remedy remains merely in respect of the reduced annuity. [*Parke, B.*—The testator makes an alteration with respect to a charge upon land, and that cannot take effect. The question is, whether, if the alteration cannot take effect to the full extent of the testator's intention, it shall take effect at all. It is evident he did not intend to make any alteration, unless it could take effect as to the charge on the land.] This being primarily a charge on the personal estate, it is revoked pro tanto; and the primary charge being revoked, the accessory, viz., the remedy by distress against the land, given in another part of the will, can also exist only in respect of the reduced annuity. The

(a) 1 Meriv. 193.

(b) 1 Russ. 425.

(c) 3 Myl. & Cr. 763.

case of *Brudenell v. Boughton* (a) is directly in point for this purpose. There it was held, that wherever a testator gives a personal legacy charged on real estate, and by a codicil not attested according to the Statute of Frauds the legacies are diminished in amount, the reduced legacies only are a charge upon the land. That case was recognized in *Harbergham v. Vincent* (b), *The Duke of Bolton v. Williams* (c), and *The Attorney-General v. Ward* (d). [Parke, B.—The question here is not as to the effect of the codicil, but quo animo the erasures were made in the will. If they were only conditional, in order to the substitution of a new charge, then the question is, whether, as they cannot so operate, the cancellation is not void altogether.] The effect is the same, however the revocation takes place. No particular form is necessary for revoking a bequest of personalty; it is only necessary to shew a clear intention to revoke, which the testator does here by these obliterations. If the will related merely to personalty, this clearly would be a good revocation, and there would be a substituted bequest of £200 a year instead of £600. And where there is a good bequest out of personalty, and there is personal estate to satisfy it, if it be revoked or modified, the auxiliary charge upon the land is altered too. The sixth section of the Statute of Frauds expressly declares that a will, even of lands, shall be revoked by obliteration, as well as by a subsequent testamentary instrument; and the only question in this case is, is there a valid substitution of the smaller gift for that which is obliterated? [Rolfe, B.—Is it not the same in effect as if two legacies were given, of £600 and £200, and there were an obliteration of the former?] Yes; and that would be a good revocation, whether it were a charge on the land or otherwise.

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Coote, contra.—The defendant is entitled to an annuity

(a) 2 Atk. 268.

(b) 2 Ves. jun. 204.

(c) Cited, id. 216.

(d) 3 Ves. 327.

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or rent-charge of £600 a-year during her life. This is a *specific devise* of realty, charged with the payment of this annuity, which distinguishes this case from those that have been cited. Other parts of the testator's freehold estates are then given to other persons for other purposes; and then comes the residuary clause, whereby all his residuary real estate is made subject to the annuities and legacies. If by the erasures and alterations in the will the testator had fully effected his purpose of revocation, why should he make the codicil to confirm those alterations? It is clear on the authorities that he has *not* effected his purpose of reducing this annuity. A testator may, no doubt, revoke a bequest in his will by obliteration, but it must be done *animo revocandi*; if it be not so, but merely for the purpose of *substitution*, the sixth section of the Statute of Frauds does not apply, and the case must be looked at subject to the general restrictions of that statute: *Short v. Smith* (a); *Kirke v. Kirke* (b). If, therefore, there had been no codicil, this obliteration alone could not have revoked the original gift. But then the plaintiffs rely on the rule of equity, which is stated in *Sheddon v. Goodrich* (c), that where there is a charge on land by way of pledge or security for a gift of personalty, if that gift be taken away or altered, the pledge also fails or is altered accordingly. But that rule is applicable only to the case of general legacies charged on the whole real and personal estate. Here, however, the personal estate is *not* primarily charged, but the real estate which is specifically devised to the testator's son. [*Rolfe, B.*—If the son had died in his life-time, which would have borne the annuity, the heir or the executor?] The land would have descended to the heir, he being a trustee for the annuitant. In *Brudenell v. Boughton*, the legacies were mere personal gifts, and there followed a general devise of real estate, after pay-

(a) 4 East, 419.

(b) 4 Russ. 435.

(c) 8 Ves. 681.

ment of debts and legacies. In such a case, no doubt, the personal estate is primarily charged, because the law presumes a direction to the executors to pay the legacies out of it. It cannot be argued that any *express* words of exemption of the personal estate are required, in respect to legacies or annuities, though there are in respect to debts, which *by law* are charged on the personal estate. This is well put in the argument of Mr. *Pepys*, in *Kirke v. Kirke* (a). "The law throws the debts upon the personalty, which, therefore, must always remain liable Legatees are in a situation altogether different. The testator may give his legacies out of what fund he pleases; and if he gives them in such a manner that they are charged only on his lands, no claim can be set up against his personal assets. In such a case it is improper to say that the personalty is *exonerated*; the personalty never became liable, and therefore does not require to be exonerated." And the Master of the Rolls says (b), "If the pecuniary legacy be not given generally, but is given only out of a particular fund, there the legatee can have recourse only to the particular fund: and in this respect there is an essential difference between debts and legacies." *Fitzgerald v. Field* (c) is distinguishable, because there there was an express direction that the annuities should in the first instance be paid out of the personal estate; whereas here the real estate devised to Ralph Nicholson, and not the personal estate, is made the primary fund for the satisfaction of them. In *Beckett v. Harden* (d), the testator devised to J. B. all his plantations, lands, stock, slaves, &c. &c., in the island of St. Kitt's, to the use that W. B. should have an annuity of £150 for his life, to be issuing thereout, and subject to and chargeable as aforesaid, to the use of J. B. in fee. By a codicil, reciting the death of W. B., he devised the same annuity to

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(a) 4 Russ. 448.

(b) *Ib.* 449.

(c) 1 Russ. 425.

(d) 4 M. & Selw. 1.

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trustees in trust for M. G.; and by a second codicil, he revoked that part of the first in which he had given the annuity of £150 to M. G., and instead thereof gave her £20 a-year for life. And it was held, that the annuity given to M. G. was not reduced by the second codicil, it not having been executed according to the Statute of Frauds. There, as here, personal estate was mixed up with the gift; but there was also, as here, an express charge of the legacy on the real estate. So, in *Mortimer v. West* (a), the testator, by his will, gave an annuity payable out of his freehold, copyhold, and personal estate; and by a codicil, not duly attested, revoked the annuity: it was held that it nevertheless remained a charge upon the freehold estate. The distinction is between the cases in which there is a general gift of real and personal estate, the land being merely a pledge for the payment of the legacy, and a specific devise of the land as the primary fund, which is the case here. In such case, it matters not that the testator has also made the personal estate liable to the same charge.

Martin, in reply.—It cannot be doubted that the alterations in other parts of this will, *e. g.* the substitution of an annuity of £50 instead of £150, are effectual (b); yet this, of the £200 instead of £600, is said not to be so, though all were made at the same time, and clearly in the exercise of the same intention. [*Rolfe*, B.—The words “after her decease” (b) are also struck out; but can that change a postponed into an immediate devise?] The codicils all shew that the testator’s object was thereby to relieve his *personal estate*, for the benefit of the more immediate objects of his bounty; and he has done all which by the law, as it then stood, was sufficient for that purpose; yet it is contended that this is to have no effect, in direct defiance of his intention as so stated. Here there was a clear

(a) 2 Sim. 274.

on the face of the original will,

(b) These alterations appeared which was produced to the Court.

animus revocandi, although there was also an intention of substitution. The case of *Short v. Smith* was merely a substitution of other trustees to carry into effect the same objects, leaving every bequest and disposition of the property untouched. *Kirke v. Kirke* is quite distinguishable: the judgment in that case proceeded on the ground that the charge was to be paid exclusively out of the real estates, and that the personal estate was not, by the will in its original state, applicable at all to the payment of the legacies. It is a mistake to suppose, that in respect of the annuity in question in the case of *Fitzgerald v. Field*, there was a direction that the personalty should be primarily charged. In *Beckett v. Harden*, the alteration was by a codicil, which makes all the difference; and there it was a charge on part only of the personalty,—on a particular estate, with the stock upon it. Here the revocation is not by the codicil, but by the obliteration. In *Mortimer v. West*, also, the only question was as to the operation of a codicil.

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The judgment of the Court was now delivered by

PARKE, B.—The material facts in this case were as follows.

Ralph Nicholson, by his will, duly signed and published in the presence of and attested by three witnesses, devised certain real estates in Essex to his son Ralph Nicholson in fee, charged with the payment of an annuity of six hundred pounds to his daughter Elizabeth James, the defendant, for her life, with the usual powers of distress and entry; and after various other devises and bequests, he gave all the residue of his estate, after payment of his debts, and the legacies and annuities thereinbefore bequeathed, and the duty payable thereon, to his said son, his heirs, executors, and administrators. On the 15th of August, 1830, the testator with his pen erased the word “six,” in the gift of

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the annuity, and wrote over it the word "two," leaving, however, the word "six" still legible: and on the same day, he signed a codicil in the presence of and attested by one witness only, mentioning that he had on that day made the above-mentioned alteration.

The testator died in December, 1831, and his will and codicil, with other codicils not material to be now considered, were duly proved soon after his decease, and the executors possessed themselves of his personal estate, which was more than sufficient to satisfy his debts and legacies, including the annuities.

The plaintiffs are the parties entitled to the real estate under Ralph Nicholson, the devisee, and they have brought the present action, which is an action of trespass for seizing their goods under a distress. The question is, whether the defendant is entitled under the will and codicil to an annuity of £600 per annum, or to an annuity of £200 per annum only. If she is entitled to £600 per annum, then it is admitted that the distress was lawful, and that this action cannot be maintained.

It was not, and indeed could not have been, disputed, but that if the annuity had been charged on the real estate only, then neither the erasure nor the codicil would have affected it. The erasure would have had no effect, because the testator did not mean to destroy the annuity of £600 per annum in any other way than by substituting for it an annuity of £200 per annum. The substitution in the will was inoperative, having been made after the subscription of the witnesses, not in their presence, and without republication; and the substitution, for the purpose of giving effect to which the erasure was made, thus failing, the law is clear that the erasure fails also. It is treated as an act done by mere mistake, *sine animo cancellandi*. What the testator in such a case is considered to have intended, is a complex act, to undo a previous gift, for the purpose of making another gift in its place. If the latter

branch of his intention cannot be effected, the doctrine is, that there is no sufficient reason to be satisfied that he meant to vary the former gift at all. The codicil or memorandum, being unattested, clearly could have no effect on the disposition of the real estate.

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But on the part of the plaintiffs it is argued, that, taking such to be the law where the gift relates to real estate only, yet here the case is different, for that, looking to the whole will, the personal estate would be the primary fund for payment of the annuity, the real estate being liable only in case the personal estate should be deficient. And then it was said, the erasure and codicil together would certainly have the effect of reducing the annuity, so far as it was payable out of the personal estate, and so, by necessary consequence, must affect the real estate, which is merely charged by way of security, in case the personal estate should be insufficient. And in support of this proposition the plaintiffs relied mainly on the case of *Brudenell v. Boughton*, before Lord *Hardwicke*. The defendant's counsel, on the other hand, contended that, even supposing *Brudenell v. Boughton* to have been well decided, yet it did not apply to a case like the present, but only to the case of a general charge of legacies; and he referred to *The Attorney-General v. Ward*, *Kirke v. Kirke*, *Beckett v. Harden*, and other cases.

We do not think that, in order to decide this case, we are bound to discuss, or indeed that we should be warranted in discussing, the question as to what effect a court of equity might give to the acts of this testator. The question for our decision is a mere legal question. The testator by his will gave to the defendant a legal interest in his lands (for an annuity charged on land, with a power of distress, is clearly a legal interest), and what we have to decide is, whether that legal interest has since been altered. We are clearly of opinion that it has not. It is

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clear, that if the annuitant had nothing but the land to resort to, her interest would have remained unaltered, for the reasons already mentioned, and the circumstance that she may, through the medium of a court of equity, have another fund liable to her demand, cannot possibly affect our judgment. A Court of law cannot look to anything but the legal rights of the parties; if, by means of the erasure and codicil, that which was originally a right to or a security for £600 per annum, has now become a security for £200 per annum only, the parties injured by the attempt to enforce the larger demand must have recourse to a court of equity for relief. The legal interest remains as it was originally.

That legal interest is a rent-charge of £600 per annum, created by a will duly executed and attested. The gift of this legal interest has not been cancelled, for the erasure was made *sine animo cancellandi*. It has not been affected by the codicil, for the codicil is not duly attested, and therefore cannot even be looked at, so far as the real estate is concerned. On this short ground there must be

Judgment for the defendant.

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July 10.

THIS was an action of ejectment, to recover possession of a messuage and lands, with the appurtenances, situate at Congresbury, in the county of Somerset. The declaration contained two sets of demises—the first set were laid on the 1st of June, 1836, and the second set on the 1st of January, 1842. The first set of demises were respectively by the Governors of the Hospital of Queen Elizabeth of Bristol, by the mayor, aldermen, and burgesses of Bristol, and by the members of the old corporation by name. The second set of demises were by the governors of the hospital, the members of the old corporation by name, the mayor, al-

A testator, by his will, dated in 1586, devised the manor of C., and all his lands in C., to trustees for the founding, by the mayor and aldermen of Bristol, of an hospital for the education of poor infants and orphans, and that they should be for ever the governors, &c., of the same.

Queen Elizabeth by charter ordained, that the said mayor and common council, and their successors, should be called "The Governors of the Hospital of Queen Elizabeth of Bristol," and should have the government of all the said orphans, &c., and of all the lands, tenements, &c., and should be a body corporate and politic of itself, for ever, capable of holding lands, &c. The hospital and lands continued vested in the mayor and common council as Governors of the Hospital down to the passing of the Municipal Corporation Act (5 & 6 Will. 4, c. 76). By the 71st section of that act it was enacted, that, in every borough in which the body corporate shall stand seised of any hereditaments in trust for charitable uses or trusts, all the estate, right, interest, and title, and all the powers of such body corporate, in respect of the said uses and trusts, should continue in the persons who, at the time of the passing of the act, were such trustees as aforesaid, until the 1st of August, 1836, or until Parliament should otherwise order, and should immediately thereupon utterly cease and determine: Provided that, if Parliament should not otherwise direct on or before the 1st of August, 1836, the Lord Chancellor should make such orders as he should see fit for the administration, subject to such charitable uses and trusts as aforesaid, of such trust estates. Parliament having made no provision, the Lord Chancellor, by an order dated the 19th of October, appointed certain persons (being in fact the members of the new corporation) to be trustees of the charity estates lately vested in the corporation of Bristol. An action of ejectment having been brought on demises by the Governors of the hospital, and also by the old and new corporation of Bristol, to recover possession of the charity estates:—*Held*, first, that, notwithstanding the 71st section, the legal estate remained, and had always been vested in the corporation as Governors of the Hospital, and that the 71st section affected only the equitable interest in, or rather the right of administering the charitable funds; and therefore that the plaintiff was entitled to judgment on the demises from the corporation.

Secondly, that the meaning of the 71st section was, that the estate and interest, in respect of the *uses and trusts* only, and not the *legal estate*, was to continue in those in whom it was then vested.

Quere, whether the 71st section applied to this case, because the parties seised of the land were not the municipal body corporate of Bristol, but a separate corporation, viz. the governors of the hospital, though the natural members of both bodies corporate were the same: but *Held*, that the plaintiff was at all events entitled to recover under the demise from the governors of the hospital.

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dermen, and burgesses of Bristol, and the members of the new corporation by name.

The action was commenced on the 14th day of April, 1842.

The cause was tried before *Cresswell, J.*, at the Wells Summer Assizes, 1842, when a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case.

John Carr, of the city of Bristol, gent., by his will, dated 10th of April, 1586, willed and ordained (amongst other things) that his manor or lordship of Congresbury, and all his lands, tenements, and hereditaments, with their appurtenances, in Congresbury and elewhere, in the county of Somerset, together with their profits, and the rents reserved upon certain grants and leases of divers parts thereof in his said will mentioned, should be and remain unto Thomas Aishe, Thomas Aldworth, Robert Dowe, and John Bythesea, and their heirs for ever, in trust, after paying his debts, funeral expenses, and legacies, to bestow the residues of the aforesaid lands, tenements, and hereditaments in the said county of Somerset, and the issues and profits of the same, so that they should be and remain for ever to the erecting and founding in due form of law, within the city of Bristol, in some convenient house and place, by the mayor and aldermen of the city aforesaid for the time being to be appointed and provided, an hospital or place for the education of poor infants and orphans born in Bristol or the manor of Congresbury aforesaid, upon a foundation like as the Hospital of Christ, nigh St. Bartholomew's in London, was founded; and that the mayor and commonalty of the city aforesaid should and might for ever be the patrons, guiders, and governors of the same hospital or house.

The testator died shortly after making the above will; and, in the year 1589-90, application was made by the corporation of Bristol to Queen Elizabeth for a charter

or the better establishment of the charity-school; and such charter was granted by her said Majesty by letters patent under the Great Seal, bearing date 21st March (32 Eliz.), 1589-90, by which, after reciting the will of the said John Carr, and that he had died seised in his demesne as of fee of the premises in his will described, and that the said premises, at the date thereof, were held by the said trustees (naming them) by lawful assurance to the uses and intents aforesaid, her said Majesty did give and grant license to the then mayor and commonalty of the city of Bristol and their successors for ever, to build, erect, found, and establish an hospital within the city aforesaid, to be and remain for ever for poor orphans to be brought up, educated, and instructed; and that the said hospital, after that it should have been so founded and established for ever thereafter, should be and be called "The Hospital of Queen Elizabeth of Bristol:" and further, her Majesty did ordain that the *mayor and common council of the city aforesaid, and their successors for the time being*, should be and be called for ever thereafter "The Governors of the Hospital of Queen Elizabeth of Bristol," and should have the government of all the persons within the said hospital from time to time living, and of the said orphans and children, and of all and singular the lands, tenements, hereditaments, goods, chattels and other things whatsoever, for the maintenance and sustentation of the same hospital; and that the same governors in deed and name thenceforth for ever should be one *body corporate* and politic of itself for ever, by the name of *The Governors of the Hospital of Queen Elizabeth of Bristol*, and should have perpetual succession and a common seal, and by the same name should and might be able and in law capable to hold lands, tenements, and rents, reversions, hereditaments, goods, and chattels, to hold to them and their successors for ever, and might implead and defend in all Courts, with power to make bye-laws for the government of the said

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hospital and children, officers and servants, and also for the letting and settling the lands and tenements of the said charity. And the said charter gave and granted license to the aforesaid trustees, their heirs and assigns, all and singular the manor, lands, tenements, and hereditaments in Congresbury, which were of the said John Carr, to give, grant, and convey the same to the aforesaid governors of the hospital aforesaid, to hold to them and their successors, for the maintenance of the hospital and infants aforesaid, and gave power to the governors to receive, acquire, and hold the same to themselves and their successors to the uses and intent aforesaid.

In pursuance of the license contained in the above charter, the said Thomas Aldworth and others, by deed-poll under their hands and seals, dated 28th June, 38 Eliz., did give, grant, enfeoff, and confirm to the Governors of the Hospital of Queen Elizabeth of Bristol, and their successors for ever, all that the manor of Congresbury and the lands and tenements, rents, reversions, and hereditaments, with the appurtenants there, and all and singular rents and profits whatsoever, reserved and payable out of any messuages, lands, tenements, or hereditaments in Congresbury aforesaid, with the appurtenances, which were of the said John Carr, for the sole use and behoof of the maintenance of the hospital and infants aforesaid, and did deliver and give seisin of the same manor and lands to the said governors: memoranda of the giving and taking of which are indorsed on this deed-poll.

The letters patent and conveyance aforesaid were afterwards confirmed by an act of Parliament passed in the 39 Eliz., intituled, "An Act for the establishing of the Hospital of Queen Elizabeth in Bristol, and for the relief of the orphans and poor there."

The charity thus founded and established, and the manor and lands thus settled and assured to its use and maintenance, continued and remained under the management of,

and vested in, the mayor and common council of the city of Bristol for the time being (the mayor and common council comprising the whole of the members of the corporation of Bristol), as the Governors of the Hospital of Queen Elizabeth of Bristol, down to and at the time of the passing of the act of the 5 & 6 Will. 4, c. 76, hereinafter referred to.

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On the 9th December, 1768, James Butcher surrendered into the hands of the said governors, as lords of the said manor of Congresbury, the messuage and lands sought to be recovered in this action, part of the said manor, and retook the same from them, to have and to hold the same unto the said James Butcher for the term of his own life, and, after his decease, to have and to hold unto Mary Norton, wife of William Norton, for her life, and William Norton, son of the first named William Norton, for his life, and the life of the longest liver of them, according to the custom of the manor, at and under the yearly chief rent of 10s. 9d.; and James Butcher was thereupon again admitted, and did fealty. An entry of this grant is contained in the court-roll book of the Governors of the Hospital of Queen Elizabeth of Bristol, lords of the manor of Congresbury, in the said county of Somerset.

The said Mary Norton, in the court-roll mentioned, departed this life in the year 1784, leaving the said James Butcher, in the said court-roll mentioned, her surviving, and in possession of the said premises; and the said James Butcher departed this life in the year 1791 so possessed; and William Norton the son, in the said court-roll mentioned, entered into and continued in possession of the said premises, under the said grant, until the time of his decease. And the said William Norton, the son, departed this life on the 24th of April, 1836, leaving Anna Norton, his widow, the defendant in this cause, him surviving. The said William Norton, the son, did yearly and up to the 29th of September, 1835, being the last yearly day of payment previous to his decease, pay to the mayor and

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common council of Bristol, as such governors, the chief rent or sum of 10*s.* 9*d.*, being the amount reserved by the said court-roll to the said Governors of the Hospital of Queen Elizabeth of Bristol, in respect of the premises in the said court-roll mentioned, and comprised in the declaration in this cause.

The defendant has, ever since the decease of her said husband, refused to quit or give up possession of the said premises to the said Governors of the Hospital of Queen Elizabeth of Bristol, and, since their appointment, to the trustees or governors of the said hospital appointed by order of the Court of Chancery, being the persons named as lessors of the plaintiff in the eighth demise of the declaration in this cause.

Demands and applications for possession of the said premises were made to the defendant by the said Governors of the Hospital of Queen Elizabeth of Bristol, prior to the first day of June, 1836, and by the said trustees or governors, lessors of the plaintiff in the eighth demise, prior to the first day of January, 1842, all of which said applications were refused by the said defendant, who still holds the same premises.

By the act 5 & 6 Will 4, c. 76, s. 1, (which received the royal assent on the 9th of September, 1835), so much of all laws, statutes, and usages, and of all royal and other charters, grants, and letters patent then in force, relating to the several boroughs named in the schedules A. and B. to that act annexed, as was inconsistent with or contrary to the provisions of that act, was thereby repealed and annulled. By sect. 6, it was enacted, that, after the first election of councillors by virtue of the said act in any borough, the body corporate should take and bear the name of "The Mayor, Aldermen, and Burgesses of such Borough." By sect. 38, that, after the declaration of the first election of the councillors under that act, in any borough named in the said schedules, the mayor, alder-

men, and common councilmen, by whatsoever name or style they might be known or called, then in office, should go out of office, and their whole powers and duties should cease. And by sect. 71, after reciting that divers bodies corporate then stood seised of sundry hereditaments, in trust for certain charitable trusts, and that it was expedient that the administration thereof should be kept distinct from the public stock and borough fund, it was enacted, that, in every borough in which the body corporate, or any one or more of the members of such body corporate, in his or their corporate capacity, then stood seised or possessed of any hereditaments &c., in whole or in part, in trust or for the benefit of any charitable uses or trusts whatsoever, all the estate, right, interest, and title, and all the powers of such body corporate, or of such member or members of such body corporate, in respect of the said uses and trusts, should continue in the persons who, at the passing of that act, were such trustees as aforesaid (notwithstanding that they might cease to hold any office by virtue of which, before the passing of that act, they had been such trustees), until the 1st of August, 1836, or until Parliament should otherwise order, and should immediately thereupon utterly cease and determine. Provided always, that, if Parliament should not otherwise direct on or before the said 1st of August, 1836, the Lord High Chancellor should make such orders as he should see fit for the administration, subject to such charitable uses or trusts as aforesaid, of such trust estates.

In schedule A. to the above-recited act annexed, the borough and city of Bristol is mentioned by the name of "The Mayor, Burgesses, and Commonalty of the City of Bristol."

The first election of councillors for the borough of Bristol under this act took place on the 26th of December, 1835. Public declaration of such election was made in the Guildhall of Bristol on the 28th of that month; and the

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first quarterly meeting of the new corporation took place on the 1st January, 1836. Under the provisions of the said 71st section, those persons who were the mayor and common council of Bristol at the time of passing that act, continued to be the Governors of the Hospital of Queen Elizabeth of Bristol, to the 1st of August, 1836.

Parliament having made no provision for the appointment of trustees prior to that day, a petition was, on the 17th of August, 1836, presented to the Lord High Chancellor by two of the members of the town council of Bristol, stating, that all the estate and interest and powers of the body corporate, in respect of the uses and trusts, had utterly ceased; and that in consequence of there being no longer any trustees the affairs of the charities could not be legally administered; praying that it might be referred to one of the Masters of the said Court of Chancery, to approve of some proper persons to be appointed trustees of the said charities; and by an order made by the Lord Chancellor upon the said petition, bearing date the 31st of August, 1836, his Lordship did order, that it be referred to the Master of the Court in attendance during the vacation, to appoint proper persons to be trustees of and for the said charity estates and property late vested in or under the administration of the corporation of Bristol, or any of the members thereof in that character, which were affected by the said section of the said act.

The case then stated, that the Master made his report, and expressed his opinion that Richard Smith and others (naming them, being in fact the members of the town council of Bristol) were proper persons to be trustees of the charity estates late vested in or under the administration of the corporation of Bristol, which were affected by the 71st section of the act; and by an order of the Lord Chancellor, dated the 19th of October, it was ordered that the Master's report should be confirmed.

By an act of the 1st Victoria, the style of the corpora-

tion of Bristol was changed to "The Mayor, Aldermen, and Burgesses of the City of Bristol."

The question for the opinion of the Court is, whether the plaintiff is entitled to recover possession of the premises in question, or any of them, under any or either of the demises in the declaration. The defendant contends, that the facts disclosed in the case do not entitle the plaintiff to support either of the demises.

The verdict is to stand or be entered upon all or any of the demises, and for such part of the premises, or for the defendant, as the Court shall direct.

The case was argued in Easter Term last [May 8] by

Erle, for the lessors of the plaintiff.—The lessors of the plaintiff are entitled to recover; for the legal estate in this property is either in the trustees appointed by the Lord Chancellor, or in the persons who were trustees at the time of the passing of the act. It is submitted, however, that it passed, by virtue of the 5 & 6 Will. 4, c. 76, to the trustees appointed by the Lord Chancellor. The intent of the statute was to take the charity funds and property from the individuals who constituted the old corporation, and to transfer the legal estate in them to the new corporate body. The proviso in the 71st section of the act, which empowers the Lord Chancellor to "make such orders as he should see fit for the administration, subject to such charitable uses or trusts as aforesaid, of such trust estates," authorizes him to pass the legal estate. The first part of the 71st section enacts, "that, in every borough in which the body corporate, or any one or more members of such body corporate in his or their corporate capacity, now stands or stand solely, or together with any person or persons elected solely by such body corporate, &c., seised or possessed for any estate or interest whatso-

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ever, of any hereditaments, &c., in trust or for the benefit of any charitable uses or trusts whatsoever, all the estate, right, interest, and title, and all the powers of such body corporate, or of such member or members of such body corporate, in respect of the said uses and trusts, shall continue in the persons who, at the time of the passing of this act, are such trustees as aforesaid, notwithstanding that they may have ceased to hold any office, by virtue of which, before the passing of this act, they were such trustees, until the 1st of August, 1836, or until Parliament shall otherwise order, and shall immediately thereupon utterly cease and determine." Now, by that clause, the legal estate is continued to the persons who, at the time of the passing of the act, were trustees, notwithstanding they had ceased to hold the offices by virtue of which they had become trustees. And then it provides, that if any vacancy should be occasioned amongst the charitable trustees before the 1st of August, it should be lawful for the Lord Chancellor, on petition, to appoint another trustee to supply such vacancy, and every person so appointed a trustee, should be a trustee until the person in the room of whom he was chosen would regularly have ceased to be a trustee, and he should then cease to be a trustee. And it further provides, that after the 1st of August, the Lord Chancellor shall make orders for the future administration, subject to such uses, of such trust estates. By virtue of that clause, the persons nominated by the Lord Chancellor become, by the nomination alone, seised not only of the beneficial interest, but also of the legal estate in the land. It would be absurd to suppose that it was intended only to transfer the beneficial interest, for then the trustees would have no power of distress to recover the rents. If any other construction be adopted, the legal estate must be in abeyance, or revert to the Crown; a construction which the Court would not willingly adopt, as it would be attended

with the utmost inconvenience. *Trent v. Hanning* (a), and the cases there cited, *Oates* dem. *Markham v. Cooke* (b), and *Taylor v. Webb* (c), are authorities to shew that trustees take such estates as are necessary for the purpose of carrying the trusts into execution. That principle was recognised by this Court, in *Barker v. Greenwood* (d), as the settled law; and also in *Doe* dem. *Noble v. Bolton* (e), *Jefferson v. Morton* (f), 1 Powell on Devises, p. 223, *Ackland v. Pring* (g), and *Gibson v. Lord Montford* (h). The legal estate, at the time the act passed, was in the old corporation as Governors of Queen Elizabeth's Hospital, and the effect of the statute and the Lord Chancellor's order was to transfer the legal estate to the persons nominated by him. [*Parke, B.*—You seek to construe the Lord Chancellor's order like a will; and you contend that the estate vests in the new trustees, by virtue of the act of Parliament, without any conveyance.] Yes; that is the argument. In *Butler and Baker's case* (i), it is said that both an act of Parliament and a will "are always construed and expounded according to the intent and meaning of the parties thereto:" and where you can gather the intention of the parties to pass the estate, the Court must carry it into effect. There are many authorities for construing statutes according to the intention of the makers of them: Bacon's Abr. "Statute" (I), pl. 5, 6; *Rex v. Peace* (k). If capable of two constructions, they must be construed to mean that which is most convenient. The difficulty here arises from the wideness and generality of the expressions in the act: but the Court will put such a construction upon them as is reasonable and convenient, to carry the inten-

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(a) 7 East, 97.

(b) 3 Burr. 1684.

(c) Styles, 319.

(d) 4 M. & W. 429.

(e) 11 Ad. & Ell. 192; 3 Per.
& D. 135.

(f) 2 Wms. Saund. 11, note 17.

(g) 2 Man. & Gr. 947; 3 Scott,
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(h) 1 Ves. sen. 491.

(i) 3 Rep. 27.

(k) 4 B. & Ad. 41.

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tion of the legislature into effect. If the Lord Chancellor had no power to transfer the legal estate, then it vests in nobody, and remains in abeyance, or else his order vests the beneficial interest in the individual parties nominated, and the legal estate returns to the corporation, in whom it was originally vested.

Cockburn, for the defendant.—The lessors of the plaintiff have no title to recover, as the legal estate does not now exist in any of them ; for, by the operation of the 71st section of the act, it was, on the 1st of August, 1836, taken out of the corporation, in whom, by the same section, it had been previously said it should continue vested up to that time ; and there is nothing to vest it subsequently in any one else. [*Parke*, B.—It was taken out of the corporation, and vested in the individuals who were trustees at the passing of the act, until the 1st of August, 1836, and then it returns into the old corporation.] The act says that the estate shall continue in the persons who were trustees until the period mentioned, and then that it should wholly cease and determine. [*Parke*, B.—Does that mean that the estate should cease and determine, or only that the *new estate* should cease?] In *Bignold v. Springfield* (a), it was held, on the construction of the 71st section, that the administration of charity estates and funds did not continue in the corporation in question after the 1st of August, 1836. [*Parke*, B.—It was not necessary there to determine in whom the legal estate was vested.] The effect of the 71st section is to give the Lord Chancellor power, in case Parliament does not interfere, to make orders for the appointment of persons as trustees for the administration of the trust estates, but that does not give him authority to vest the legal estate in them. But even assuming that he had the power

(a) 7 Cl. & Fin. 71.

to convey the legal estate, still he has not exercised it, for the bare appointment of trustees does not vest the legal estate in them. The administration of charities has been vested in the Lord Chancellor from time immemorial, but the invariable practice has been for the Lord Chancellor to appoint new trustees, and for the old trustees to convey to the new trustees. Such would have been the proper course here, for the Lord Chancellor to have directed the old trustees to convey to the new trustees. The cases cited on the other side, relating to wills, stand on a totally different ground; for in those cases there is generally an express devise to the trustees. The mere term "trustee" does not necessarily carry with it the notion of a party, so described, having the legal estate, for there are trustees for many purposes, where the legal estate is vested in others; as in the instance of the trustees of the British Museum, and a variety of cases of that kind. There may be trustees for external purposes only, as the management of the estate. A person's having the "administration of the trust estate" rather seems to mean his having the management of the property, and the receipt of its revenues, and matters of that description. The defect in the English Municipal Act is supplied in the Irish Municipal Act, (3 & 4 Vict. c. 108, s. 112), where the legal estate is expressly vested in the persons constituting the old corporation until a certain day, and then, without any conveyance, it passes to and vests in the new trustees. That seems to shew that the legislature thought that the mere appointment of trustees by the Lord Chancellor could not have the effect of passing the legal estate; for that provision would have been unnecessary, if the effect of the order was to vest the property in the new trustees. The term "trustee" does not carry the legal estate; it is a term unknown to the common law, and the Court will not give an effect to that term which the law will not give it. If the proper construction of the act would be attended with the inconveniences complained

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of, it would be better to amend it by another act of the legislature. But the estates having been vested by this act of Parliament in certain individuals, whose estate is made to determine on the 1st of August, 1836, the legal estate at the time of the action brought was neither in them nor in the new corporation.

Erle replied.

Cur adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—The question in this case arose out of the 71st section of the Municipal Corporation Act (5 & 6 Will. 4, c. 76.) It appears by the case, that Queen Elizabeth, by letters patent, constituted the mayor and common council of the city of Bristol, for the time being, to be a corporation, by the name of the Governors of the Hospital of Queen Elizabeth of Bristol; and the manor of Congresbury, including the lands which form the subject of this action, was afterwards conveyed to that corporation, on certain charitable trusts, pursuant to the will of John Carr, who died in or about the year 1586.

The mayor and common council of Bristol, in their corporate character of Governors of the Hospital of Queen Elizabeth, administered the estates of the charity from the time of Queen Elizabeth, up to the 9th of September, 1835, being the day on which the Municipal Act received the royal assent; and from that time, the persons who then constituted the mayor and common council continued such administration, pursuant to the statute. No provision having been made by Parliament as to the estates vested in municipal bodies for charitable purposes, the Lord Chancellor, in the month of August, 1836, referred it to one of the Masters of the Court of Chancery to appoint new trustees of the Bristol charities. The Master

accordingly appointed new trustees; and his report was confirmed by the Lord Chancellor, in the month of October 1836. In this state of things, the question for our decision is, in whom the legal estate in the manor of Congresbury, of which the lands in question in this cause are part, is now vested.

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The question depends entirely on the construction to be put on the 71st section of the Municipal Corporation Act; by which it was enacted, among other things, that in every borough in which the body corporate then stood seised of any hereditaments, in trust for any charitable uses, all the estate and interest, and all the powers of such body corporate in respect of such uses, should continue in the persons who, at the time of the passing of the act, were such trustees, until the 1st of August, 1836, and should immediately therefrom utterly cease and determine. Provided that, if Parliament should not otherwise direct on or before the 1st of August, 1836, the Lord Chancellor should make such orders as he should see fit for the administration, subject to such charitable uses as aforesaid, of such trust estates.

It has occurred to us as a matter of considerable doubt, whether this section applies to the present case, because the municipal body corporate of Bristol did not stand seised of any land. It was a separate corporation, with a distinct name of incorporation and a distinct corporate seal, that was seised of the land in question, though the natural members of the body corporate were the same as those who constituted the municipal corporation. If that doubt were well-founded, the plaintiff is entitled to recover on the demise by the Governors of the Hospital of Queen Elizabeth in Bristol. If it be not, and the corporation is treated as the same, and as seised of the land, we still think that the plaintiff is entitled to recover on the same demise. Had it not been for the 71st clause, it is clear that the trust estates in question would have continued in

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the corporation as before the passing of the act. For though, under the previous sections, the name and style of the corporation, and the mode of electing the members, were changed, yet the identity of the body itself was not affected. (See ss. 1 and 6). The corporation is still the same body which, by the charter of Queen Elizabeth, was incorporated by the name of "The Governors of the Hospital of Queen Elizabeth in Bristol;" and the sole question, therefore, is as to the effect of this 71st section.

We are of opinion, notwithstanding this clause, that the legal estate remains, and, in fact, always has been vested in the corporation; and that this 71st section affects only the equitable interest, or rather the right of administering the charitable funds. The object of the clause, as appears from its preamble, was to keep the administration of the charitable funds distinct from that of the municipal funds; and the question is, what is the true construction of the enactment whereby this object was to be effected? On the part of the defendant, it was contended, that, by the express words of the clause, all the estate of the corporation in the charity property was transferred, for a limited period, to the persons who, at the passing of the act, constituted the corporation; and then that, at the end of such limited period, namely, on the 1st of August, 1836, their estate was made absolutely to cease; the effect of which would probably be to revest the legal property in the heirs of the original founder.

If this be the necessary meaning of the words used by the legislature, it would be our duty to construe the clause accordingly, whatever might be the inconvenience of such a course. But unless it is very clear that we should be doing violence to the language of the act by adopting any other construction, the great inconvenience of that suggested by the defendant may certainly afford fair ground for supposing that it cannot be what was contemplated by the legislature, and may well warrant us in look-

ing for some other interpretation. Now it is to be observed, that what the preamble states as expedient to be done, is not to affect the ownership of charity estates, but only to keep the administration of them distinct from that of the borough fund; and for this purpose it certainly would not be matter of necessity that the legal interest should be affected. The subsequent enactment was assumed in the argument to be, that all the estate and interest of the corporation in the charity lands should be transferred to the individuals who, at the time of the passing of the act, constituted the body corporate, and should so continue until the 1st of August, 1836, and should then cease. This, however, is by no means the necessary meaning of the words used: by reading the words *all the estate, &c., and all the powers, &c.*, as under a vinculum, the whole sentence, i. e., *the estate, &c.*, as well as *the powers, &c.*, will have reference to the latter words, "*in respect of the said uses and trusts;*" and the meaning will then be, that the estate and interest in the trust only, and not in the legal estate, shall continue in those in whom it was then vested. The language, it must be admitted, is far from clear, and might, if the context so required, have been taken to transfer the legal estate in the lands affected by the trusts; but we thus see that it may also be taken to refer to the charitable trust only, i. e., the right or duty of administering the fund; and this, as it appears to us, is all which was meant, and is, consequently, the construction which we adopt. The clause, thus construed, presents nothing obscure or incongruous. For a short period the administration of the trusts is left in the hands of those who would, for the most part, have been previously administering them; and after the lapse of a few months, the whole management is made to devolve on the Lord Chancellor. These are provisions plain in themselves, easy to be acted upon, and well calculated to effect all which the preamble states as being expedient. Whereas on the con-

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struction contended for by the defendant, we are driven to impute to the legislature the anomalous intention, first, of vesting the fee simple in an indefinite, unascertained number of persons, and then, after the lapse of a few months, destroying the interest of those persons, without pointing out what was to become of the fee from that time. No doubt but that, even on that construction, the Lord Chancellor would have the power of getting in the legal fee, but this could only be done by means of a petition or bill in Chancery, entailing on the charity costs, without, as we can discover, any benefit whatever; and these considerations well warrant us in endeavouring to find some other meaning fairly attributable to the language used.

It does not appear to us that the case of *Bignold v. Springfield* (a), referred to by the defendant, assists him in his view of this case. The only point really in dispute there was, whether the powers given to the Lord Chancellor came into operation on the 1st of August, 1836. The House of Lords decided that they did; and it will be seen that *Tindal*, C. J., in delivering the opinion of the Judges, does not say that any *estate ceased or was divested* on the 1st of August, 1836, but that the *administration* of the charity estates, given by the clause in question, ceased on that day: a construction of the clause in strict accordance with our opinion.

The only further argument of the defendant which it remains to notice, is that which was founded on the Irish Municipal Act, which was passed in the year 1840, 3 & 4 Vict. c. 108. The 112th section of that act makes provision for charitable trusts similar or nearly similar to those in the English act. But in the Irish act express provision is made as to the legal estate, and the difficulties which had occurred on this subject in the English act are met and obviated. We do not, however, think that any reliance is

(a) 7 Clarke & Fin. 71.

to be placed on this circumstance. The Irish act did not become law until a year after the decision in *Bignold v. Springfield* in the House of Lords; and as C. J. *Tindal* had in that case pointed out to the attention of the House, that the clause in the English act was so framed as to give rise to difficulties in its construction, it was very natural, that in making provisions on a similar subject in a subsequent year, the legislature should take care to avoid all ambiguity, and so to word the clause as to prevent the occurrence of those difficulties which the Chief Justice had alluded to. The Irish act, indeed, goes further than the English, by at once vesting the legal estate in the charity trustees; a provision which is certainly very convenient, but which unfortunately does not exist in the clause now under our consideration. The English act must be construed in the same way as if the Irish act had never passed: and for the reasons we have given, we think that, according to its true construction, the legal estate is, and always has been, where it was at the time of the passing of the act; consequently, that the plaintiff is entitled to judgment on the demise from the corporation.

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In an action for running down a ship, it appeared that the plaintiff had been obliged, in consequence of the injury, to employ a steam-tug, the owners of which demanded £150 for salvage, and commenced a suit in the Court of Admiralty against the plaintiff, who paid £20 into Court; the Court ultimately decreed £45 to the salvors:—*Held*, upon these facts, that the plaintiff was not entitled to recover the amount of the costs incurred by him in that suit.

Semble, that the proper question for the jury in such a case is, whether, in respect to the suit for salvage, the plaintiff pursued the course which a prudent and reasonable man would do in his own case: and that, if the jury think he did, the costs of the suit may be recovered. *Tindall v. Bell*, 228

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An affidavit described the deponent as “Edward Charles Pownall,” but

the signature to it was “Cha^s. Ed. Pownall:”—*Held*, that this was no objection.

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plaintiff, it had a wafer affixed to it before the signature of the defendant:—*Held*, first, that the plea was proved, and that it purported to be the deed of the defendant; secondly, on a motion for judgment non obstante veredicto, that the plea was a good defence to the action. *Davidson v. Cooper*, 778

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I. Authority of Court to direct Arbitrator to proceed with Reference.

A cause and all matters in difference were referred by an order of reference to the decision of an arbitrator, the arbitrator to make and publish his award, ready to be delivered to the parties, or either of them, "or if they or either of them should be dead before the making of the said award, to their respective personal representatives who should require the same," on or before a certain day. Several meetings were from time to time held, but one of the parties died before the reference was concluded. After his death, the arbitrator was requested to proceed with the reference, but he declined doing so, the executrix of the deceased party having refused to attend, and protested against his proceeding:—*Held*, that the Court had no power to direct the arbitrator to proceed, or to compel the executrix to attend before him. *Lewin v. Holbrook*, 110

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ARBITRATION.

Where, in an action on the case by a reversioner, which was referred by order of Nisi Prius to an arbitrator, he awarded (inter alia) that the action was brought to try a right, besides the mere right to recover damages:—*Held*, that he was not bound to state what was the right which the action was brought to try.

Where, by an order of reference, the arbitrator is "to determine what he shall think fit to be done by either of the parties," he is not bound to direct affirmatively that some thing shall be done, unless he shall so think fit. Per Lord Abinger, C. B., *Alderson*, B., and Gurney, B.; *Parke*, B., dissentiente. *Angus v. Redford*, 69

2. In an action of assumpsit, the defendant pleaded non assumpsit, payment, and a set-off; and issues having been joined thereon, the cause and all matters in difference were, by a Judge's order, referred to arbitration, the costs of the cause to abide the event, and the costs of the reference and award to be at the discretion of the arbitrator. The arbitrator awarded "that the plaintiff should pay to the defendant the sum of 16*l.* 10*s.* 2*d.*, being the balance which I find to be due from the plaintiff to the defendant;" and he further awarded that each party should pay his own costs of the reference, and a moiety of the costs of the award:—*Held*, that the award was bad, on the ground of uncertainty as to the finding of the issues, and there being no adjudication at all upon the cause. *Pearson v. Archbold*, 477

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The Court will not grant a rule calling upon a party to pay money found by an award to be due from him, without an affidavit of the service of the award. *Pearson v. Archbold*, 108

ARREST.

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An order for the arrest of a defendant, under the 1 & 2 Vict. c. 110, s. 3, may be made on an affidavit of the plaintiff, that he has *been informed and believes* that the defendant is about to leave England, provided it state the name and description of the person from whom he has received such information.

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An attorney is not entitled to recover his bill of costs for conducting an action which he has not terminated, but which has been discontinued, unless he shews satisfactory reasons for not proceeding with it, and gives his client reasonable notice thereof. *Nicholls v. Wilson*, 106

II. *Taxation of Bill.**Costs of Taxation after Action brought.*

Where an order is obtained to tax an attorney's bill, after action brought thereon, and the defendant then pays the amount found to be due into Court, which the plaintiff takes out, the costs of the taxation of the bill are rightly taxed to the plaintiff as costs in the cause. *Thomas v. The Mayor, Aldermen, and Burgesses of the Borough of Swansea*, 83

III. *When liable to Action for suing wrong Party.*

Case is not maintainable against an attorney, who, being retained to sue for a debt a person of the same name with the plaintiff, by mistake and without malice, takes all the proceedings to judgment and execution against the plaintiff, or, having obtained judgment against the right person, by mistake and without malice issues execution against the plaintiff.

In the latter case, the plaintiff has a remedy in *trespass*. *Davies v. Jenkins*, 745

AUCTION DUTY.

The plaintiff, an auctioneer, was employed to sell certain lands of the two defendants. One of the defendants, without the plaintiff's knowledge, employed H. to bid for one of the lots, in order to raise the price, and the plaintiff knocked down the lot to H. The plaintiff then sold two other lots belonging to different persons, and at the close of the entire day's sale demanded the auction-duty from H., who refused to pay it. The conditions of sale stated, that the auction-duty was to be paid by the purchaser "immediately after the sale."

Held, first, that, in an action by the auctioneer against the defendants for the amount of the auction-duty, H. was to be considered as the highest bidder; secondly, that there was a valid demand of the duty from H. *Wilson v. Carey*, 368

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BAILMENT.

Liability of gratuitous Bailee for Negligence.

A person who rides a horse gratuitously, at the owner's request, for

the purpose of shewing him for sale, is bound, in doing so, to use such skill as he actually possesses; and if proved to be a person conversant with and skilled in horses, he is equally liable with a borrower for injury done to the horse while ridden by him. *Wilson v. Brett*, 113

BANK OF ENGLAND.

Liability of, for Payment of Dividends on Stock to Trustees.

A., being possessed of 12,058*l.* 6*s.* 8*d.* new three and a half per cent. stock, bequeathed to E. C. a certain interest in £5000, parcel thereof. A judgment having been obtained against E. C., the judgment creditor obtained a Judge's order under 1 & 2 Vict. c. 110, ss. 14 and 15, charging this latter sum with the judgment debt, which upon cause shewn was made absolute as to so much of the dividends as were payable to E. C. for her own use. These orders having been served upon the Bank of England, the Bank refused in consequence to pay the dividends upon the 12,058*l.* 6*s.* 8*d.* to the executors under A.'s will, and they brought an action against the Bank to recover those dividends; and the Bank now applied for a stay of proceedings on payment of a portion of the dividends:—*Held*, that there was no ground or necessity for the application, the Bank being bound to pay the dividends to the legal owners, the executors, who were answerable for their proper application. *Churchill v. Bank of England*, 323

BANKRUPTCY.

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LIEN.

I. Statutes.

- (1). *Retrospective Operation of 6 Geo. 4, c. 16, s. 90.*

The 90th section of the Bankrupt

Act, 6 Geo. 4, c. 16, applies to actions afterwards brought to trial by assignees acting under commissions which were issued before the passing of the act, as well as to actions by assignees under future commissions.

That section applies to actions of ejectment by an assignee. *Doe d. Johnson v. Liversedge*, 517

- (2). *Operation of 2 & 3 Vict. c. 29.*

The assignees of a bankrupt are entitled to recover in trover goods bona fide seized by an execution-creditor under a fieri facias on a judgment upon a warrant of attorney, after a secret act of bankruptcy, but not sold until after the date and issuing of the fiat, and notice thereof; and the stat. 2 & 3 Vict. c. 29, does not protect such an execution. *Skey v. Carter*, 571

- (3). *Retrospective Operation of 5 & 6 Vict. c. 122, s. 24.*

The 24th section of the Bankrupt Act, 5 & 6 Vict. c. 122, whereby the London Gazette, containing the advertisement of the adjudication of bankruptcy, is made, in certain cases, conclusive evidence of the bankruptcy, does not apply to adjudications made before the 11th of November, 1842, on which day the act came into operation. *Edwards v. Sherren*, 595

II. Title of Assignees.

- (1). *To Choses in Action of Bankrupt's Wife.*

The assignees of a bankrupt may maintain an action in their own names only, for a chose in action belonging to the wife of the bankrupt before marriage, as a promissory note given to her dum sola.

And in such action, the defendant cannot set-off a debt due to him from the bankrupt. *Yates v. Sherrington*, 42

(2). *To Bankrupt's Rights of Action.*

1. Trespass for breaking and entering the dwelling-house and garden of the plaintiff, and making a great noise and disturbance therein, &c. &c., whereby the plaintiff and his family were greatly harassed, disturbed, and annoyed in the peaceable possession of the dwelling-house, &c.

Plea, that, after the trespass and after the commencement of the suit, the plaintiff had become bankrupt, and one W. P. was appointed assignee, whereby and by virtue of the statutes &c. the said causes of action vested in the said W. P.:—*Held*, on general demurrer, that the plea was bad.

Quære, whether it would have been good if it had been shewn that the locus in quo passed to the assignee.
Spence v. Rogers, 191

2. An action of trespass, for seizing and taking the plaintiff's goods, under a false and unfounded claim of a debt, per quod the plaintiff was annoyed and prejudiced in his business, and believed by his customers to be insolvent, and certain lodgers left his house, does not pass to the plaintiff's assignees on his bankruptcy. *Brewer v. Dew*, 625

3. A. agreed in writing with B. and C., on behalf of themselves and D., as partners in trade, to serve them, B. and C., and the survivor of them, for seven years, as their foreman, and not to engage in trade on his own account during that period without their consent; and B. and C. agreed to pay him wages after the rate of 3*l.* 3*s.* per week, so long as he should serve them faithfully:—*Held*, in the Exchequer Chamber, (reversing the judgment of the Court of Exchequer), that the right of action for a breach of this agreement, by the dismissal of A. from the service without reasonable cause, passed to the assignees of A. on his bankruptcy, as being part of his

personal estate, whereof a profit might be made.

Held, also, (affirming the judgment of the Court below), that the action was maintainable against B., C., and D. jointly, though B. and C. only were parties to the written agreement.
Drake v. Beckham, 315

(3). *Title by Relation—Pleading—Implied Colour.*

In trover by assignees of G. H. and W. L., bankrupts, against the sheriff, he pleaded, that one G. H. and one W. L. were traders, and indebted to divers persons in £200, and that they became bankrupts; that afterwards, G. S. and W. S. sued out a fi. fa. against the said G. H. and W. L., which was delivered to the defendant, as sheriff, to be executed; and thereupon the defendant, after the bankruptcy, and before the fiat, seized and took in execution the goods in the declaration mentioned, and before the fiat levied by sale thereof the monies mentioned in the writ: that the said goods were, immediately before the bankruptcy, the property of G. H. and W. L., and liable to be taken and sold under the writ. The plea then stated the issuing of the fiat, the adjudication, and the appointment of the plaintiffs as assignees, whereby they became, as such, entitled to the possession of the said goods as from the time when the said G. H. and W. L. became bankrupts, *which possession is the said possession of the plaintiffs as assignees in the declaration mentioned*. It then averred that the fi. fa. was bonâ fide executed and levied, without notice of a prior act of bankruptcy, that the judgment was not founded on a warrant of attorney or cognovit, and that the seizure under the writ was the conversion in the declaration mentioned:—*Held*, on special demurrer, that the

plea was not bad as amounting to an argumentative plea of not possessed, inasmuch as it gave an implied colour, by admitting the right of the assignees, by relation, to the lawful possession of the goods at the time of the seizure under the *fi. fa.* *Held*, also, that it sufficiently appeared from the whole plea, that the persons mentioned therein as having become bankrupts were the same persons as those mentioned in the declaration. *Held*, also, that it was not necessary to aver that the execution was subsequent to the stat. 2 & 3 Vict. c. 29. *Unwin v. St. Quentin*, 277

III. *Trover by Assignees—Conversion after Bankruptcy—Pleading.*

Declaration in trover by assignees of a bankrupt stated, that M. and H., the bankrupts, before their bankruptcy, were lawfully possessed of certain goods; that, before the bankruptcy, they came to the possession of the defendants; and that the defendants, knowing the goods to belong to the plaintiffs, as assignees, *after* the bankruptcy, converted them. A separate commission issued against M. alone on the 7th of November; on the 8th, the goods were sold by the defendant, as sheriff; on the 9th, a joint commission issued against M. and H., under which the plaintiffs were appointed assignees; and the plaintiffs afterwards, and after the goods were delivered to the purchasers, demanded them of the defendants, who refused them:—*Held*, first, that the sale, and not the demand and refusal, constituted the conversion; secondly, that the allegations of the declaration, that the plaintiffs were possessed of the goods as assignees of both bankrupts, and that the defendants converted the goods *after* the bankruptcy, were not supported by the evidence. *Edwards v. Hooper*, 363

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A declaration in covenant stated that the defendant had granted an annuity to the plaintiff, and for the better securing the said annuity demised a rectory and prebendal stall to certain trustees, and covenanted for payment of the annuity: and alleged as a breach the non-payment thereof. To this declaration the defendant, being under terms of pleading issuable, pleaded that the indenture was made with the view of charging, and was a charge upon, the rectory, the same being a benefice with a cure of souls, contrary to the stat. 13 Eliz. c. 20, and that the indenture and security were made to evade the statute:—*Held*, that the plea was not an issuable one, as it stated no new fact upon which the plaintiff could go to the jury; and that the statute avoided the charge upon the benefice only, but not the covenant in the deed containing it. *Sloane v. Packman*, 770

BILLS AND NOTES.

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INSOLVENT, (3).

I. *Promissory Note payable by Instalments, within 3 & 4 Ann. c. 9.*

A promissory note payable by instalments is assignable within the stat. 3 & 4 Ann. c. 9; and the maker is entitled to the days of grace upon the falling due of each instalment. *Oridge v. Sherborne*, 374

II. *Acceptance of Bill to be afterwards drawn.*

A promise to accept a bill not yet drawn does not amount to an acceptance of it; although the bill be discounted for the drawer on the faith of such promise. *Bank of Ireland v. Archer*, 383

III. *Acceptor, when estopped to deny forged Indorsement.*

A bill of exchange, purporting to be drawn by B. and W. (a really existing firm) payable to their order, and to be indorsed by them, was negotiated by the acceptor with that indorsement upon it. The drawing and indorsement were forgeries:—*Held*, that if the bill was accepted, and negotiated by the acceptor, with knowledge of the forgery, he was estopped to deny the indorsement, as well as the drawing, by B. & W.: but *semble*, that, where the name of a real party as the drawer is forged, a party who accepts the bill in ignorance of the forgery, is estopped to deny the drawing only, but not the indorsement, although in the same handwriting. *Beeman v. Duck*, 251

IV. *Indorsement, how far a new drawing.*

A declaration alleged that the defendant made his bill of exchange, and directed the same to J. B., and required him to pay to the defendant's order 187*l.* 15*s.*, and then *indorsed* the bill to the plaintiffs. It appeared that the bill had been drawn by one F., and indorsed by the defendant in blank, and having been delivered by the defendant to F., was by him taken to a bank of which the plaintiffs were the managers, where it was received by them in renewal of another bill discounted by them, and drawn and indorsed by the same parties:—*Held*, 1st, that proof of the defendant's being the *indorser* of the bill did not support the averment that he made the bill; 2ndly, assuming that an indorser might be treated as a drawer, still the present indorsement, being in blank, was equivalent to the drawing of a new bill payable to bearer, and therefore the bill was misdescribed in the declaration; 3rdly,

that the plaintiffs were not entitled to recover on the account stated. *Burmester v. Hogarth*, 97

V. *Alteration of Note after its making—Pleading.*

In an action by the payee against the maker of a joint and several promissory note, the defendant is not entitled, under the plea that he did not make the note, to set up a defence that he signed the note as surety, on the faith that other persons would also sign it as sureties, and that the name of one of them who had so signed was cut off from the note.

Semble, that the note was vitiated by cutting off the signature of one of the joint and several makers from it. *Mason v. Bradley*, 590

VI. *Notice of Dishonour.*

1. B., the plaintiff's agent at Sunderland, having occasion to remit money to the plaintiff, paid the amount into the defendant's bank at Sunderland, and received a bill of exchange indorsed by the defendant, which he, B., indorsed and transmitted to the plaintiff. The bill fell due on Saturday, Oct. 31st, and was dishonoured. On that day the plaintiff wrote to B. a letter, which B. received on the Monday, containing the following:—"I have also to apprise you, that the draft for 33*l.* 14*s.*, due the 1st November [Sunday], has been duly presented this day and returned dishonoured; probably it may be up on Monday; it is drawn on P. & Co.; it will be proper to advise the drawers, in case the acceptor do not remit." On the Wednesday following, B. gave notice to the defendant of the dishonour:—*Held*, too late.

The holder of a bill of exchange need not inform a party, to whom he gives notice of its dishonour, that he looks to him for payment. *Miers v. Brown*, 372

2. In an action by the indorsee against the drawer of a bill of exchange for 53*l.*, the charges for noting, &c., being 6*s.* 6*d.*, the following notice of dishonour was given:—"We are instructed by H. S. (the plaintiff) to apply to you for payment of the *under-mentioned* sum, and to acquaint you, that, unless the same, together with 5*s.*, the costs of this application, be paid at &c., on &c., legal proceedings will be commenced against you to enforce payment thereof without further application." The following was the memorandum at the foot of the letter:—"53*l.* 6*s.* 6*d.* due on your dishonoured *note*, dated the 19th of December last; 5*s.* costs of letter—53*l.* 11*s.* 6*d.*:"—*Held*, that the notice of dishonour was sufficient.—*Stockman v. Parr*, 809

VII. *Actions on.*

Allegation of Promise to pay.

In assumpsit by the indorsee against the drawer of a bill of exchange, it is necessary to allege a promise to pay; and without such allegation the count is bad on special demurrer.—*Smith v. Cox*, 475

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CHURCHWARDEN.

- (1). *Vesting of Lands in*, by 59 Geo. 3, c. 12, s. 17.

The 59 Geo. 3, c. 12, s. 17, enacts, that all buildings, lands, &c., purchased or taken on lease by the churchwardens and overseers of the poor of

any parish, by the authority and for the purposes of that act, shall be conveyed, demised, &c. to the churchwardens and overseers of every such parish and their successors, in trust for the parish; and such churchwardens and overseers, &c. are empowered to take and hold in the nature of a body corporate all buildings, lands, &c. belonging to such parish:—*Held*, that the act made the churchwardens and overseers a corporation of a peculiar kind, differing from ordinary corporations, the object of it being the care and proper management of the parochial property; and that it was competent for any one of the churchwardens or overseers to authorize a distress for rent in arrear. *Gouldsworth v. Knights*, 337

- (2). *Liability of, to Distress for Poor Rate.*

The goods of one churchwarden are liable to be seized under a distress made by order of the other churchwarden and the overseers of a poor rate due from him, where the rate has been legally demanded, and payment of it refused; but if such churchwarden has charged himself in his account with the rate as received, to apply it to parochial purposes, the justices (who act judicially in such cases), in the exercise of their discretion, may refuse to grant a warrant. *Skingley v. Surridge*, 503

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COGNOVIT.

Attestation.

A double attestation (the first being insufficient within the 1 & 2 Vict. c. 110, s. 9) does not invalidate a cognovit.

A cognovit was signed by W. T., and attested thus:—"Witness, J. B.,

of &c., attorney at law." "Signed in the presence of me the undersigned; and I hereby certify and declare, that I am the attorney of the said W. T., and that I attended at his request, to inform him of this cognovit, and that I have informed him of the nature and effect thereof; and I hereby subscribe my name as his attorney. R. R.:"—*Held*, sufficiently attested, and that the words "Signed in the presence" &c., must be taken to refer to the signature of W. T. *Ledgard v. Thompson*, 40

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See PLEADING, I. (7).

CONTRACT OF SALE.

Acceptance of Goods—Agency of Necessity.

The plaintiffs, merchants at Dieppe, sold to the defendant, a merchant at Wisbech, a quantity of oil cake, which was delivered to the defendant there in Dec. 1841. The defendant, conceiving that the cargo did not answer the sample, landed a portion of it for the purpose of examination, and subsequently landed the whole, stored it in a public warehouse, and wrote to the plaintiffs, informing them that it lay there at their risk and costs, and requiring them to take it back; which the plaintiffs refused to do. After some correspondence, the defendant, in May, 1842, gave the plaintiffs notice that the cargo was lying at the warehouse at their disposal; and that, if no directions were given by them, it would be sold, and the proceeds applied in part payment of the defendant's damages. The plaintiffs answered that they considered the transaction at an end, and demanded payment of the price. The defendant thereupon offered the cargo for sale in his own name, and in July sold it in his own name to a third

party:—*Held*, that these facts sufficiently shewed an acceptance of the goods by the defendant, after which he could not treat the contract as rescinded; that he was not to be considered an agent of the plaintiffs from necessity, to dispose of the goods; and that he could not, in an action against him for another debt, set off money paid by him on bills which he had accepted on account of the disputed cargo before its arrival. *Chapman v. Morton*, 534

COSTS.

See COURT OF REQUESTS ACT. EJECTMENT, (3).

(1). *Of several Issues—Distributing General Issue.*

When a defendant pleads the general issue, and several special pleas which are involved in the general issue, and the defendant succeeds on the general issue, but the special pleas are found for the plaintiff, the general issue is to be construed distributively for the purpose of the taxation of costs; and the defendant is not to be allowed the costs on so much of the general issue as is involved in the special pleas found for the plaintiff, but such last-mentioned costs are to be allowed to the plaintiff. *Nicholson v. Dyson*, 545

(2). *On Judge's Order, Demand of, when sufficient—Construction of Reg. Gen. May 27, 1840.*

Costs due under a Judge's order and allocatur thereon, are payable on demand. Therefore, where costs due from a defendant under a Judge's order were demanded from the town agent of the defendant's attorney, who did not pay them, alleging that he had no instructions to do so, but would write into the country and advise payment:—*Held*, that the order was disobeyed, and that the defendant was

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DEED.

was accordingly given, and the com-
position paid to the defendant; and
he negotiated the promissory note, the
holder of which enforced payment
from the plaintiff:—*Held*, that the
plaintiff might recover back from the
defendant the sum so paid by him in
an action for money paid. *Horton v.*
Riley, 492

DECEIT.

Action for, when maintainable.

If a party makes an untrue repre-
sentation to another for a fraudulent
purpose, with the intent to induce the
latter to do an act which he after-
wards does to his prejudice, an ac-
tion on the case for deceit lies, and it
is not necessary to shew also that the
defendant *knew* the representation to
be untrue. *Taylor v. Ashton*, 401

DEDICATION.

See WAY.

DEED.

I. Delivery of—When an escrow.

It is not necessary that the delivery
of a deed as an escrow should be by
express words; if, from the circum-
stances attending the execution, it can
be inferred that it was delivered not
to take effect as a deed until a certain
condition were performed, it will op-
erate as a delivery as an escrow only.

Where a deed of assignment, pur-
porting to be made by all three part-
ners of a firm, and to convey all their
personal estate and effects whatsoever
in trust for the benefit of creditors,
was executed by one of them only:—
Held, that it operated to convey the
share of the one who so executed.

And where one of the partners exe-
cuted such an assignment of the part-
nership property before, but the others
did not execute it until after, a fiat in
bankruptcy had issued:—*Held*, in

DEED

the absence of any thing to shew
the deed was delivered to the party
that it amounted to a conveyance in
ruptcy by the one who executed it,
and that his share of the property
passed to the party to whom the
the fiat. *Bowker v. L.*

II. Attestation of, and Evidence

Where an agreement to execute a
attestation clause, and to sign it,
it, the name of a person acting as
ing witness, but the name was not
in pencil, and not by the person
witness, but by one of the parties to
the instrument:—*Held*, that it was
was no *prima facie* evidence of the
being an attesting witness, and
render it necessary to shew that the
posed witness, and that the names
of the parties might be proved by
evidence. *Cussons v. L.*

III. Alteration

A power of attorney to execute a
abroad, appointing a person to do
It was delivered to the person
according to the express terms of the
party meant to be executed, and
and he filled up the deed with his
Christian name, "John," and
that the power was not intended to
thereby. *Eagleton v. L.*

IV. Construction

By reference

A deed conveyed a certain
forming part of a conveyance, and
to a schedule annexed to the deed,
described the land, and then re-
ed "No. on the plan of the
Ferry Estate," as "the first and
cond column, headed 'Particulars
premises,' as 'a site of 10 acres
on the plan;" in a deed which was
being in the occupation of the
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in a fourth, as “34 perches.” At the time of the contract, a line was drawn upon the plan as the boundary line dividing the piece 153 b from the rest of the close of which it formed a part. The plan was drawn to a scale, but, upon measurement of the land, was found incorrect; and 153 b contained, within the line so drawn, less than 34 perches according to the actual measurement on the plan, and 27 perches only according to the actual measurement of the land:—*Held*, that the statement that the piece of land conveyed contained 34 perches was merely falsa demonstratio, the prior portion of the description being sufficient to convey it, and that the deed passed only the portion of land actually marked off on the plan, as measured by the scale. *Llewellyn v. The Earl of Jersey*, 183

V. Of Release, Construction of.

The plaintiff A., the pursuer of a mine, in order to carry it on, raised money by the deposit of a promissory note, made in his favour by seven of the shareholders, and which two other shareholders had refused to sign, and applied the money so raised in paying the workmen. At a subsequent meeting of the shareholders and creditors, an assignment of the mine, in order to sell it, and pay the debts, was resolved upon, and A. then claimed to be admitted as a creditor “for money which he had raised on note of hand to pay the workmen.” A deed of assignment was accordingly executed, to which all the adventurers were parties of the first part, and these several persons whose names were thereunto subscribed, “as creditors of the several other persons thereinbefore described of the first part as adventurers, for supplies to and debts incurred by them for or in respect of the same mine, to the amounts set opposite their respec-
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DISTRESS.

of his wife, the residue of his estate might then be collected, including the proceeds of the house and lot; if not previously sold, to be then disposed of to good advantage, and divided as follows," &c. He appointed his wife, the plaintiff, and one R. C., to be executrix and executors of his will. The plaintiff and the widow proved the will. R. C., the other executor, died in the lifetime of the widow. After the death of the widow, the plaintiff, the surviving executor, entered into a contract with the defendant for the sale of the house:—*Held*, that, whether there were or were not debts unpaid, and whether it was or was not uncertain whether any debts remained unpaid, the plaintiff had a power to sell and convey the house in fee-simple.

Quære, whether the widow could have sold the house in her lifetime, without the concurrence of the executors. *Forbes v. Peacock*, 630

DISTRESS.

For Rent.

(1). *Breaking of outer Door, when justifiable under 11 Geo. 2, c. 19.*

In trespass for breaking the outer door, and entering the plaintiff's dwelling-house, and seizing his goods, the defendant may give in evidence, under a plea of not guilty by statute, that he had entered under a warrant of distress for rent, and was forcibly turned out of possession, and thereupon broke the door and entered, in order to seize the goods. *Eagleton v. Gutteridge*, 465

(2). *How far Distrainor may be a Trespasser ab initio.*

Where a landlord distrains for rent, amongst other things, goods which are not distrainable in law, (as looms in work, there being sufficient without them to satisfy the rent), and the te-

EJECTMENT.

nant pays the amount of the costs of distress, up to the time the distress is withdrawn, the tenant is entitled, in any subsequent action at law, to recover only the damage sustained by the tenant in respect of particular goods, and not the amount paid by him.

In such a case, the plaintiff is a trespasser *ab initio* in respect of the goods which were not paid for. *Harvey v. Pocock*,

EJECTMENT.

(1). *Service of Process.*

What circumstances will dispense with the necessity of service of process in ejectment. *Roe*,

(2). *Limitation of Verdict in Jury Process.*

Where a defendant entered into the ordinary course of business, and sent a verdict, the defendant is not bound to enter a verdict for him as to the premises to which the plaintiff fails to prove title.

In ejectment, the defendant is not bound to describe in the venire the names of the parties, as being "b. Knight" (the lessor instead of "John Doe" &c.) "and A. The objection was overruled:—*Held*, granting a new trial. *Port v. Rhodes*,

(3). *Taxation of Costs.*

Where the lessor is entitled to an ejectment, after objection and judgment, delay in recovering the execution for mesne profits is authority to order a

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shall be at liberty to enter satisfaction
on the record, unless the lessor of the
plaintiff shall tax his costs within a
limited time. *Doe d. Drax v. Filler,*
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ESCROW.

See DEED, I.

EVIDENCE.

(1). *Entries of deceased Agent.*

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-Error

Where it was the course of busi-
ness for H., one of the workmen at a
coal-mine, to give notice to Y., the
foreman, of the coal sold, and Y., not
being able to write, employed one B.
to make entries of the sales in a book
at the time from his (Y.'s) informa-
tion:—*Held*, that, H. and Y. being
dead, the entries were not evidence in
an action for the price of such coals.
Brain v. Preece, 773

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(2). *As to Sufficiency of Stamp not to be left to Jury.*

Where the admissibility of a bill of
exchange, purporting to be a foreign
bill, and stamped accordingly, was
objected to on the ground that, though
it purported to be drawn abroad, it
was in fact an inland bill, drawn in
London, and evidence was offered to
prove that fact:—*Held*, that the
Judge ought to have received the evi-
dence in that stage of the cause, and
decided upon the admissibility of the
instrument, and not to have received
the evidence afterwards, as part of the
defendant's case, and submitted it to
the jury. *Bartlett v. Smith,* 483

EXECUTION.

See PROCESS, II.

SHERIFF, (2), (3).

EXECUTOR.

See DEVISE.

EXTENT.

When it overrides Lien on Goods pledged by Crown Debtor.

A writ of extent having issued against A., a maltster, for a debt due to the Crown from him for duties on malt, a cargo of malt was seized under it in the hands of the defendant. The defendant being allowed to plead to the extent, in order to state his interest in the goods, alleged by his plea that the malt in question, after being manufactured, had had the duty charged upon it, and that such duty was paid; that it was then deposited by A., the maker, with the defendant, upon a contract with him, that he was to accept certain bills of exchange drawn by A., and that the malt was to be held by him as a pledge for the payment of them, and in case the bills were not paid, he was then to be at liberty to sell the malt; that the bills first accepted were renewed, but before the renewed bills became due the malt was seized:—*Held*, that the malt was seizable in the hands of the defendant, under 28 Geo. 3, c. 37, s. 21, as goods in the custody or possession of a person in trust for the maker, chargeable with duties of excise in arrear and owing from such maker; such goods having been, whilst in the hands of A., liable not only for the specific duties chargeable upon them, (which had been paid), but for other duties for which A. was responsible at that time, and remaining so at the time of the seizure.

Quære, whether goods chargeable with excise duties under 7 & 8 Geo. 4, c. 53, s. 28, deposited with a person as a pledge for acceptances given by him to the maker, before the passing of 4 & 5 Vict. c. 20, by which the section of the former act imposing the duties was repealed, and similar duties imposed, were liable, since the passing of that act, to be seized in the

GOODS SOLD AND DELIVERED.

hands of the pledgee. *The Attorney-General v. Trueman*, 694

FOREIGN JUDGMENT.

See PLEADING, III. (10).

FRAUDS, STATUTE OF.

See PLEADING, I. (2), 2.

FRAUDULENT REPRESENTATION.

See DECEIT.

INSURANCE, (3).

GAMING.

Where a person loses money by gaming, to the amount of £10 and more, and pays it by a cheque on a banker, which is cashed by the banker on a subsequent day and in a different parish, the offence prohibited by the 9 Ann. c. 14, s. 2, is committed at the place where the money is lost and won, and not at that where the cheque is cashed; and therefore an action under that section by a common informer, for the sum lost and the treble value, is properly brought on behalf of the poor of the parish in which the play took place.

Such a transaction is substantially a gaming for ready money, and not a gaming on credit.

Semble, however, that the 9 Ann. c. 14, s. 2, is not confined to gaming for ready money only. *Smith v. Bond*, 549

GOODS SOLD AND DELIVERED.

When maintainable.

Indebitatus assumpsit in the sum of £3000 "for the price and value of a main engine and other goods sold and delivered." It was proved at the trial, that the contract was, "to build

orse power for the be *completed and* or end of Decem- ed that the differ- engine were con- aintiff's manufac- rts at different in- ndant's colliery, a miles, where they al, and so made *held*, that the price ot recoverable in ction.

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, c. 31, s. 2, ren- which the offence ion by a riotous liable to make e injured party. sum or sums of ed upon the hun- uch action shall over and above be paid by such with the rest of rovides for cases committed in a ot contribute to l, or contributes ing part of any & 6 Will. 4, c. to which courts ce are given are ll to the county after provided. are to pay the ions at the as- re also to pay a unty expenses.

In an action against the hundred of Salford, to recover compensation for injury done by a riotous mob to premises within the borough of Manchester, which formed part of the hundred of Salford—*Held*, that the action was properly brought against the hundred, and that the borough was liable as part of the hundred, although it came within the provisions of the 5 & 6 Will. 4, c. 76, s. 112. *Birley v. The Inhabitants of the Hundred of Salford*, 391

HUSBAND AND WIFE.

See BANKRUPTCY, II. (1).

(1). *Admission of Wife, when Evidence against Husband.*

Where a wife carried on in her husband's absence the business of a shop, and by his authority attended to all the receipts and payments:—*Held*, in an action of replevin by the husband, that a statement made by the wife to the landlord, on the occasion of her paying him rent for another person, that she would pay the rent of the shop on a future day, and admitting its amount, was not evidence against the husband of the terms of the tenancy. *Meredith v. Footner*, 202

(2). *Scire facias, to join Husband in action commenced by Wife, when necessary.*

Where an action is brought by a feme sole, who marries after the commencement of the suit, but before the trial, it is not necessary to sue out a scire facias, to make the husband a party to the suit. *Mary Walker v. Golling*, 78

INFANT.

(1). *Necessaries.*

Dinners, confectionery, or fruit,

supplied to an infant, an undergraduate in the university, having lodgings in the town, are not, *prima facie*, necessities: and in an action brought against him for such articles, no special circumstances being shewn, the Court directed a nonsuit to be entered. *Brooker v. Scott*, 67

(2). *Account stated by—Ratification after full Age.*

An account stated by an infant is not absolutely void, but voidable only, and may be ratified by him after attaining his full age; and if he does so ratify it, an action of *debt* as well as an *assumpsit* may be maintained thereon.

Quære, whether, to a plea of infancy, the plaintiff ought to new assign the ratification as a new contract entered into after the party has obtained the capacity of contracting, or plead it by way of replication, as an act giving validity to an otherwise invalid contract. *Williams v. Moor*, 256

INFORMATION.

Amendment of, by the Crown.

A rule, on the part of the Attorney-General, to amend an information at the suit of the Crown, is absolute in the first instance. *The Attorney-General v. Ray*, 464

INSOLVENT.

(1). *Payment by, how and by whom avoided.*

Where a trader, being in insolvent circumstances, makes a voluntary payment to a creditor, contemplating at the time either the taking the benefit of the Insolvent Act, or his being made a bankrupt; if he afterwards petitions for relief under the Insolvent Act, the assignees under his in-

INSURANCE.

solveny may recover back the money so paid; so, if he afterwards become bankrupt, the assignees in bankruptcy may recover it back. *Ogden v. Stone*, 494

(2). *Conveyance by, when void against Assignee.*

A conveyance of lands which is fraudulent and void against the creditors of the conveying party, within the 13 Eliz. c. 5, is void also as against his assignee on his insolvency, who represents the creditors; and the assignee may recover back the lands in ejectment. *Doe d. Grimsby v. Ball*, 531

(3). *Discharge of, as to right of action on Bill of Exchange.*

The discharge of an insolvent debtor from a debt in respect of which he has accepted a bill of exchange is no discharge as to the bill in the hands of a third person, unless the holder's name be inserted in the schedule, or it be stated therein that he is unknown, pursuant to the stat. 1 & 2 Vict. c. 110, s. 75. *Beck v. Beverly*, 845

INSURANCE.

See PLEADING, III. (4).

(1). *Insurable Interest.*

A person who assigns away his interest in a ship or goods, after effecting a policy of insurance upon them, and before the loss, cannot sue upon the policy, except as a trustee for the assignee, in a case where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit. *Powles v. Innes*, 10

(2). *Insurable Interest—Pleading.*

Declaration on a policy of insurance stated, that the plaintiff caused

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stating the time of a vessel's sailing, is *prima facie* evidence against an underwriter as to what it contains, as the underwriter must be presumed to have a knowledge of its contents, from having access to it in the course of his business: but where the insurer, in a letter written for the purpose of effecting the insurance, made a false statement and concealment as to the time of the vessel's sailing, and the underwriter, relying upon that representation, did not in fact look at the list, but acted upon the representation in making the insurance:—*Held*, that the underwriter was not bound by the contents of the list, so as to render the misrepresentation and concealment by which he was misled immaterial, and that it was the duty of the Judge to have pointed out to the jury that misrepresentation and concealment. *Mackintosh v. Marshall*, 116

JOINT STOCK BANKING COMPANY.

(1). *When within 7 Geo. 4, c. 46.*

Where a banking co-partnership, established under 7 Geo. 4, c. 46, s. 9, had once begun to carry on the trade and business of bankers, and issued notes accordingly, but subsequently stopped payment, and merely kept the establishment open for the purpose of paying their notes and winding up the affairs of the concern:—*Held*, that they still continued to be a banking co-partnership, within the meaning of the 7 Geo. 4, c. 46, so as to be entitled to sue by their public officer. *Davidson v. Cooper*, 778

(2). *Action against Public Officer.*

1. *Pleas allowed in.*

The Court refused to allow a defendant, who was sued as the public officer of a banking company, to plead,

in addition to pleas of fraud, &c., a plea that he was not the public officer at the commencement of the suit. *Needham v. Law*, 400

2. *Plea of Defendant's Bankruptcy.*

In an action against the public officer of a banking co-partnership, the Court set aside a plea of the defendant's bankruptcy, on the plaintiff's undertaking not to sue out execution personally against the defendant, his lands or goods. *Steward v. Dunn*, 63

JOINT STOCK COMPANY.

See *SCIRE FACIAS*, II.

JUDGMENT.

See *BANK OF ENGLAND*.

Charging Stock under 1 & 2 Vict. c. 110, s. 14.

Where a testator by his will directed that certain stock should stand in the names of his executors, and the dividends should be paid to G. C. during his life, and on his death to E. C., his widow, "she to lay it out for the good of his children," and that, when the youngest child should come of age, the fund should be sold out and divided amongst the children:—*Held*, in an action in which E. C. (after the death of G. C.) was a defendant, that an order might be made under the stat. 1 & 2 Vict. c. 110, ss. 14 and 15, for charging "so much of the dividends as were payable to E. C. for her own use and benefit." *Fowler v. Churchill*, 57

JURY.

See *WRIT OF TRIAL*.

JURY PROCESS.

See *EJECTMENT*, (2).

LANDLORD AND TENANT.

JUSTICES OF THE PEACE.

See *TURNPIKE ACTS*, (1).

LANDLORD AND TENANT.

(1). *Implied Undertaking by Lessor for Habitableness of Premises.*

It is an implied condition in the letting of a furnished house, that it shall be reasonably fit for habitation; if it be not (e. g. where it is greatly infested with bugs) the tenant may quit it without notice. *Smith v. Mar-rable*, 5

(2). *Estoppel on Tenant by Payment of Rent.*

Certain land was vested in trustees upon trust to apply the rents to the repair of a parish church. Those trustees, in 1818, demised to S. for ten years, and again in 1828 for ten years more, which lease expired in 1838. During the lease S. assigned to the plaintiff, and after the expiration of it the plaintiff continued in possession under the trustees, paying rent to them. The trustees afterwards, and after the 59 Geo. 3, c. 12, came into operation, viz. in 1842, assigned by deed to new trustees, two of whom were the churchwardens of the parish at the time that a distress for rent was made:—*Held*, that the payment of rent to the old trustees was evidence of a new taking under them as tenant from year to year, which precluded the plaintiff from contesting the title of the old trustees, and that the new trustees, who claimed under them by deed of assignment, had a good title by estoppel. *Goulds-worth v. Knights*, 337

(3). *Notice to Quit.*

Quære, whether, where a tenant holds a farm from year to year, the lands from the 2nd of February, and the house from the 1st of May, a notice to quit the whole, given half a year

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pleaded as to the publishing of that
part of the libel, and not to the in-
ducement in the declaration as to that
part: and, thirdly, that it was not bad
as amounting to not guilty; the aver-
ment in the declaration, as to the
word "black-sheep," being properly
matter of *inducement*, which it was
necessary to traverse specially. *M'Gre-*
gor v. Gregory, 287

—*Travers-*

LIEN.

See EXTENT.

General Lien of Wharfinger.

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S., a woolstapler at Huddersfield,
was in the habit of making purchases
of wool, which he directed to be con-
signed to the defendant, a wharfinger
and shipping agent at Hull, who for-
warded them to him at Huddersfield,
by carrier. In July, 1841, S. pur-
chased certain wool in Scotland, which
was paid for by E., his agent there,
and by him forwarded to the defend-
ant at Hull. Part of this wool, con-
sisting of ten bags, arrived at Hull on
the 27th of September, and a portion
of it was, at ten o'clock on that morn-
ing, taken possession of by the de-
fendant, the remainder being taken
possession of by him between ten
o'clock and four. E. received from S.,
in repayment of the advances made
by him for the purchase of the wool
in question, acceptances of S., which
were running at the time of S.'s bank-
ruptcy, and were afterwards disho-
noured. On the 21st of September,
E. received a letter from S., in which
he informed him of his insolvency,
and directed him to get the wool, and
do the best he could to save himself.
Accordingly, on some day between
the 26th of September and the 1st
of October, E. gave directions to the
defendant to seize the wool. The
remaining portion of the wool arrived
at Hull on the 3rd of October, and
was delivered into the defendant's

warehouse on the 6th, 7th, and 8th of that month. An act of bankruptcy was committed by S. on the 22nd of September; the fiat was dated and issued on the 27th, and was signed between twelve o'clock and two o'clock on that day, but it did not appear at what hour it was delivered out. The defendant, who claimed to retain the wool in satisfaction of a general balance, had been in the habit of sending to the bankrupt, by the carrier, together with the goods, printed delivery orders, which stated that all goods were considered as general lien, subject not only to freight, but also to the balance of any former account due from the owners or consignors. These orders had been seen more than once in the bankrupt's hands, and on one occasion the weights therein stated had been altered by him:—*Held*, in an action of trover by the assignees of S. to recover the value of the thirty-six bags of wool, first, that E. had no right to the goods in respect of which the defendant could retain them; secondly, that the defendant had not established any right of general lien, by virtue of which he could retain any part of the goods.

Semble, (per *Parke*, B.), the stat. 2 & 3 Vict. c. 29, operates to protect a claim of general lien on goods of a bankrupt coming into the hands of the party before the fiat, without notice of an act of bankruptcy. *Bowman v. Malcolm*, 833

LIMITATION ACT.

What is a future Estate within.

Copyhold lands were surrendered, in 1798, to husband and wife, for both their lives, with remainder to the heirs of the husband. In 1805, the husband absconded and went abroad, and was never afterwards heard of. In 1807, a commission of bankruptcy issued against him, and the usual as-

signment of his estate was made by the commissioners to his assignee. The wife occupied the copyhold estate until her death in 1841, whereupon the assignee was admitted:—*Held*, that an ejectment by the assignee, brought after her death, was in time, for that the husband's reversion in fee was a *future estate*, within the meaning of the 3 & 4 Will. 4, c. 27, s. 3. *Doe d. Johnson v. Liversedge*, 517

LIMITATIONS, STATUTE OF.

(1). *Payment of Interest by Contractor.*

N. having applied to D. for a loan of £300 on mortgage, D., doubting the sufficiency of the security, refused to advance it without having, in addition, a joint and several promissory note for £50 from N. and one F., payable on demand. The note and mortgage were accordingly given, the latter containing a covenant by N. to pay the sum of £300 and interest at £5 per cent. Several half-yearly payments of 7*l.* 10*s.* each for interest having been made by N.:—*Held*, in an action against F. upon the note, that such payments by N. kept all the securities alive, and prevented the operation of the Statute of Limitations as to the note. *Dowling v. Ford*, 329

(2). *Statement of Accounts, when avoided by.*

Where A. has an account against B., some of the items of which are more than six years old, and B. has a cross account against A., and they meet and go through both accounts, and a balance is struck in A.'s favour, this amounts to an agreement to set off B.'s claim against the earlier items of A.'s, out of which arises a new consideration for the payment of the balance, and takes the case out of the

ature of Limita-
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had a common interest in proving the
lands to be ancient inclosures. *Fin-
don v. Parker*, 675

MALICIOUS PROSECUTION.

Reasonable and probable Cause.

Case for a malicious prosecution.—
The plaintiff having become tenant to
the defendant, who resided in Wilt-
shire, of a house and lands in Car-
marthenshire, together with the ex-
clusive right of sporting over certain
lands adjacent, belonging to the de-
fendant, fished one of the ponds by
cutting down the dam, and but few
fish having been caught, one D., who
was the defendant's local agent, sug-
gested to the plaintiff that he might
fish a certain pond on the estate by
cutting down the bank and placing a
net to catch the fish; which the
plaintiff accordingly afterwards did
during the tenancy, and a few fish
were taken. Disputes having after-
wards arisen between the plaintiff and
the defendant, D. laid an information
before magistrates against the plain-
tiff for unlawfully and maliciously
breaking down the dam and destroy-
ing the fish, under 7 & 8 Geo. 4, c.
30, s. 15, and D. having been ex-
amined, the magistrates required the
plaintiff to find bail to appear to an
indictment for that offence at the next
assizes, where a bill was preferred but
ignored. The defendant was not pre-
sent at the hearing of the information,
nor was there any evidence to shew
that he knew that D. had given the
plaintiff permission. At the trial, the
Judge asked the jury whether in their
opinion D. had given permission, and
they found that he had; they also
found that D. acted under the de-
fendant's authority in instituting the
proceedings; and the learned Judge
having expressed his opinion that
there was an absence of reasonable
and probable cause—*Held*, that he
was correct in so deciding, and that,

independently of the permission given by D., there was no reasonable or probable cause for instituting the proceedings. *Mitchell v. Williams*, 205

MANOR.

Grant of reputed Manor, what passes by.

A grant of a *reputed* manor will not pass a freehold interest in the waste within the ambit of the manor, nor in any specific tenement of the grantor. *Doe d. Clayton v. Williams*, 803

MASTER AND SERVANT.

Discharge of Servant for Disobedience.

To an action against the defendants, proprietors of a cotton manufactory, for refusing to employ the plaintiff as manager pursuant to agreement, and discharging him from their service before the period mentioned in the agreement, the defendants pleaded that the plaintiff so wrongfully, disobediently, and unskilfully conducted himself as such manager, that they, the defendants, suffered and sustained great loss, to wit, to the amount of £1000, &c.:—*Held*, that, in order to support such a plea, it was necessary to shew not only disobedience, but such disobedience as occasioned a loss; and, there being no evidence of any loss, that the plea was not supported.

Where there has been disobedience, or an act of misconduct by a servant, known to the master at the time he discharges him, although the master does not mention that as the precise ground of discharge, he may afterwards, by shewing that the fact existed, and that he knew it, justify such discharge: but *semble*, that it is otherwise where the act of misconduct was not known to the master at the time of the discharge, as it could not then be the cause of it. *Cussons v. Skinner*, 161

MIDDLESEX COUNTY COURT ACT.

(1). *To what Cases applicable.*

The Middlesex County Court Act (23 Geo. 2, c. 33) does not apply to cases where the cause of action arises within the city and liberty of Westminster.

The 19th section of the 23 Geo. 2, c. 33, provides, that, in case any action of debt, &c. shall be brought in the Courts of Record at Westminster, and the defendant shall reside in Middlesex, &c., and a verdict shall be found for less than 40*s.*, no costs shall be awarded to the plaintiff, but the defendant shall be entitled to double costs:—*Quære*, whether that section applies to a verdict on a plea collateral to the merits of the action, as a plea puis darrein continuance of a release to a joint contractor with the defendants. *Todd v. Emly*, 610

(2). *Suggestion under, traversable.*

A suggestion under the Middlesex County Court Act, (23 Geo. 2, c. 33, s. 19), to deprive the plaintiff of costs, and allow the defendant double costs, on the ground that the plaintiff has recovered less than 40*s.* damages, and that the defendant was an inhabitant of and resident in Middlesex, and liable to be summoned to the county court, is traversable; and that, notwithstanding the plaintiff has previously shewn cause against a rule to enter the suggestion.

If the defendant succeeds, he will be entitled to the costs of that traverse.

A rule having been made absolute for the plaintiff to bring in the postea, so that the defendant might enter the suggestion thereon, the plaintiff himself entered the suggestion on the roll in a traversable form, and added a

traverse:—*Held*, that this was irregular.

Where the right of a party to any costs depends upon a fact, the determination of which is not by the statute law vested in the Court, and which must be stated on the record to justify the award of costs contrary to the usual course, the fact is traversable, and may be tried by a jury. *Watson v. Quilter*, 760

MORTGAGE.

See STAMP, (3).

VENDOR AND PURCHASER.

MUNICIPAL CORPORATION ACTS.

(1). *Retrospective Operation of 5 & 6 Vict. c. 104.*

The statute 5 & 6 Vict. c. 104, s. 1, enacts, that, from and after the passing of the act, the word "contract" in s. 28 of 5 & 6 Will. 4, c. 76, shall not extend or be construed to extend to any lease, &c.:—*Held*, that such enactment did not alter the construction to be put upon the previous act, so far as it related to any action commenced before the 10th August, 1842, when the latter act passed. *Simpson v. Ready*, 344

(2). *Regulation of charitable Trusts by.*

A testator, by his will, dated in 1586, devised the manor of C., and all his lands in C., to trustees, for the founding, by the mayor and aldermen of Bristol, of an hospital for the education of poor infants and orphans, and that they should be for ever the governors, &c. of the same. Queen Elizabeth by charter ordained, that the said mayor and common council, and their successors, should be called "The Governors of the Hospital of Queen Elizabeth of Bristol," and should have the government of all the

said orphans, &c., and of all the lands, tenements, &c., and should be a body corporate and politic of itself, for ever, capable of holding lands, &c. The hospital and lands continued vested in the mayor and common council down to the passing of the Municipal Corporation Act, (5 & 6 Will. 4, c. 76). By the 71st section of that act it is enacted, that, in every borough in which the body corporate shall stand seised of any estate or interest of any hereditaments in trust for charitable uses or trusts, all the estate, right, interest, and title, and all the powers of such body corporate, in respect of the said uses and trusts, shall continue in the persons who, at the time of the passing of the act, were such trustees as aforesaid, until the 1st of August, 1836, or until Parliament should otherwise order, and should immediately thereupon utterly cease and determine; provided, that, if Parliament should not otherwise direct on or before the 1st of August, 1836, the Lord Chancellor should make such orders as he should see fit for the administration, subject to such charitable uses and trusts as aforesaid, of such trust estates. Parliament having made no provision prior to that day, the Lord Chancellor, by an order dated the 19th of October, appointed certain persons (being the members of the new corporation) to be trustees of the charity estates lately vested in the corporation of Bristol. An action of ejectment having been brought on demises by the Governors of the hospital, and also by the old and new corporation of Bristol, to recover possession of the charity estates—*Held*, first, that, notwithstanding the 71st section, the legal estate remained, and had always been vested in the corporation, and that the 71st section affected only the equitable interest, or rather the right of administering the charitable funds;

and therefore that the plaintiff was entitled to judgment on the demises from the corporation.

Secondly, that the meaning of the 71st section was, that the estate and interest, in respect of the *uses* and *trusts* only, and not the *legal estate*, was to continue in those in whom it was then vested.

Quære, whether the 71st section applies to this case, because the parties seised of the land were not the municipal body corporate of Bristol, but a separate corporation, viz. the governors of the hospital, though the natural members of both bodies corporate were the same: but held, that the plaintiffs were at all events entitled to recover under the demise from the governors of the hospital. *Doe d. Governors of Bristol Hospital v. Norton*, 913

NEW TRIAL.

See PENAL ACTION.

Affidavit on Motion for, when to be sworn.

The Court refused to allow an affidavit to be read which was sworn after the first four days of the term, in support of a rule obtained upon it for a new trial, although the rule had in fact been obtained after the affidavit was sworn, in consequence of the motions for new trials extending beyond the four days. *Williams v. Mortimer*, 104

NOTICE TO QUIT.

See LANDLORD AND TENANT, (3).

NUISANCE.

Abatement of private Nuisance—Pleading.

A party has no right to enter upon the land of another in order to abate a nuisance of filth, without previous

notice or request to the owner of the land to remove it, unless it appear that the latter was the original wrong-doer, by placing it there, or that it arises from a default in the performance of some duty or obligation cast upon him by law, or that the nuisance is immediately dangerous to life or health. *Jones v Williams*, 176

OFFICE.

See STAMP, (2).

OVERSEER.

See CHURCHWARDEN, (1).

Appointment of Assistant Overseer.

Where a party was elected to be assistant overseer of the poor of a parish by the vestry, under 59 Geo. 3, c. 12, s. 7, and was appointed assistant, by the warrant of two justices, to perform the duties of overseer, but the resolution of the vestry electing him did not specify the duties to be performed by him:—*Held*, that this was an appointment within the statute; for though it did not in express terms, yet it did by necessary implication, specify the duties to be performed, as it necessarily implied that the parishioners, by electing him, meant him to be assistant overseer in all respects, and to perform all the duties of an overseer. *Skingley v. Surridge*, 503

PATENTS ACT.

Notice of Objections under.

To an action for the infringement of a patent, the defendant pleaded; 1. That the patentee was not the true and first inventor; 2. That the invention was not, when the letters patent were granted, a new invention; 3. That the report of the Judicial

Committee of the Privy Council, and the letters patent thereupon, were procured by fraud, covin, and misrepresentation:—*Held*, first, that the notice of objections delivered under 5 & 6 Will. 4, c. 83, s. 5, need not state *who* the first inventor was, or under what circumstances the invention had been previously used.

Secondly, that, if the defendant objects that the patent is not new, he should specify whether he objects to the patent generally on that ground, or to part only, and, if so, to what part.

Thirdly, that the notice ought to state the species of fraud, covin, and misrepresentation by which the patent was procured on which he intends to rely. *Russell v. Ledsam*, 647

PENAL ACTION.

New Trial in, after Verdict for Defendant.

The Court has authority to, and will, grant a new trial in a penal action, though the verdict be for the defendant, where they are satisfied that the verdict is in contravention of law, whether the error has arisen from the misdirection of the Judge, or from a misapprehension of the law by the jury, or from a desire on their part to take the exposition of the law into their own hands. *Attorney-General v. Rogers*, 670

PLEADING.

See BANKRUPTCY, II. (2), 1, 3;
III., IV.

BILLS AND NOTES, V., VII.

GOODS SOLD AND DELIVERED.

INSURANCE.

JOINT STOCK BANKING CO.,

(2).

LIBEL.

SCIRE FACIAS, II. (2).

TENDER.

I. Declaration.

(1). *Admission of Payments in, Effect of.*

In debt, the plaintiff demanded the sum of 10*l.* 18*s.*; the declaration then alleged, that the defendant was indebted to the plaintiff in £100 for work and labour, &c., and in £100 on an account stated; and averred, that, although the defendant had paid 89*l.* 2*s.*, parcel of the said monies, yet he had not paid the residue, amounting to the sum of 10*l.* 18*s.* above demanded:—*Held*, that, on *nunquam indebitatus* pleaded to this declaration, the plaintiff was bound, in order to recover, to prove a debt exceeding the sum of 89*l.* 2*s.* *Price v. Rees*, 576

(2). *Variance in Statement of Contract.*

1. *Assumpsit*. The declaration alleged, that, in consideration that the plaintiff would buy of the defendant a horse, at and for a "certain price or sum, to wit, the sum of 56*l.* 16*s.*," the defendant promised that the horse was sound. Breach, that he was unsound. Plea, *non assumpsit*, and a traverse of the unsoundness. At the trial, it was proved that the plaintiff, who was a tailor, agreed to give the defendant for the horse £55, and a new pair of breeches, value 1*l.* 16*s.*:—*Held*, that there was no variance. *Saxty v. Wilkin*, 622

2. *Assumpsit*. The declaration alleged, that the plaintiff had recovered against one R. S. the sum of 3007*l.* 12*s.*, and sued out a *ca. sa.*, directed to the sheriff of Middlesex, indorsed to levy 2611*l.* 7*s.* 3*d.* and interest on £2578, besides sheriff's poundage, officer's fees, &c., by virtue of which writ the said sheriff duly took and arrested the said R. S. by his body, and then had and kept and detained him in custody under and by virtue of such writ, and by execution of the same; and thereupon, and whilst the said R.

S. was so in custody, to wit, on &c., in consideration that the plaintiff would procure the release of the said R. S. from and out of the said custody under the said writ, on payment of poundage and officer's fees, he, the defendant, promised the plaintiff to pay him the sum of £500, part of the said damages and interest, within one month, and to give a bond for payment of the remainder of the debt, interest, and costs in five years. The following agreement, intitled in an action between R. B. plaintiff, and R. S. defendant, and signed by the present defendant, was given in evidence:—"In consideration of your having released the above-named defendant from custody, I hereby engage, within one month from this date, to pay you," &c. (as stated in the declaration). This memorandum was addressed to the plaintiff, and was then accepted by him, and he, at the same time, gave an order for the discharge of R. S., "on payment of sheriff's poundage and officer's fees, judgment having been satisfied," and the poundage and fees were then paid by the defendant. The sheriff's officer then stated, that R. S. was free as to that action, but, there being two detainers lodged against him, R. S. was detained in custody at the suit of other parties. The ca. sa. was irregular, it having been issued into Middlesex, without any previous ca. sa. into Kent, where the venue was laid:—*Held*, first, that the agreement to release R. S. was both prospective and conditional, and therefore that the contract was proved as laid.

Secondly, that the contract was not within the Statute of Frauds, 29 Car. 2, c. 3, s. 4, and therefore did not require to be in writing; but, had it been within the statute, *quare*, whether there was a sufficient memorandum in writing to satisfy it.

Thirdly, that the allegation in the

declaration, that the sheriff *duly* arrested R. S., did not mean that R. S. was in custody, so that he could not be discharged without the defendant's consent, but that the sheriff had duly acted under the writ, so as not to become a trespasser, and therefore that the allegation was proved. *Butcher v. Stewart*, 857

(3). *Averment of reasonable Time, when necessary or material.*

1. Assumpsit.—The declaration alleged, that the plaintiff being possessed of a bill of exchange drawn by one S. E. upon and accepted by J. S., payable to S. E.'s order, for £400, and by him indorsed to G. E., who indorsed it in blank, and a fiat in bankruptcy having issued against S. E., by a certain agreement between the plaintiff and defendant, the defendant bought of the plaintiff, and the plaintiff bargained and sold to the defendant, the said bill of exchange for £200, and it was agreed between the plaintiff and defendant, that, upon G. E. handing over to the plaintiff the sum of £200, the said bill should be delivered over to him. The declaration then alleged mutual promises, and the plaintiff's readiness to perform the agreement, and deliver the bill to the defendant or G. E., and averred, that, although the defendant did pay £50, parcel of the £200, yet he had not, although often requested, paid the residue thereof:—*Held*, that the declaration was bad on general demurrer, for not averring that a reasonable time had elapsed since the making of the agreement. *Stavart v. Eastwood*, 197

2. The defendants, overseers of the township of B., agreed with the plaintiff and several other persons, who had given notices of appeal against a poor-rate made for the township, that all matters in difference between the defendants, as such overseers, and the

plaintiff and the other appellants, should be referred to the decision of two persons named; and that the costs of the plaintiff and the other appellants, incurred by them in relation to the appeals, up to the time of the agreement, should be taxed and paid by the *overseers* of the said township. A declaration in assumpsit against the defendants, for nonpayment of such costs, alleged that they were taxed in a reasonable time after the making of the agreement, of which the defendants had notice, and were requested to pay the amount, but that they had not paid it, and it still remained unpaid to the plaintiff. The defendants pleaded, that the costs were not taxed in a reasonable time after the making of the agreement; on which traverse an issue was joined, and found for the defendants:—*Held*, that the question, whether such reasonable time had elapsed, was a question for the decision of the jury, and not of the Judge.

Held, also, on motion for judgment for the plaintiff non obstante verdicto, that, if the meaning of the agreement was that the defendants should pay the costs when taxed, the traverse was a material one, because it was reasonable that they should have the means of paying out of the parochial funds while they remained in office.

Seemle, also, (per Lord Abinger, C. B.), that, if the agreement was to be construed as a guarantee that the *overseers* for the time being should pay, the declaration was bad for not averring a demand upon, and nonpayment by, the overseers for the time being. *Burton v. Griffiths*, 817

(4). *Averment of Readiness and Willingness, when necessary.*

A count in assumpsit alleged, that, in consideration that the plaintiff, at the defendant's request, would pur-

chase certain shares in a foreign undertaking, called the Bank of Belgium, at a stated price per share, the defendant promised the plaintiff that he would, upon request, accept the shares and pay for them. The count then averred, that the plaintiff, relying upon the defendant's promise, did afterwards, to wit, on &c., purchase the said shares at the said price, nevertheless the defendant did not nor would accept them, or pay for them the money for which the plaintiff had so purchased the same, although often requested so to do by the plaintiff, and thereby the plaintiff was obliged to pay to F., the person from whom he purchased the shares, the money he was liable to pay him by reason of such purchase.

Seemle, that, whether the count imported that the plaintiff was to purchase the shares from F., and afterwards sell them to the defendant, or that he was to purchase them from F. as agent for the defendant, it was bad in substance, for want of an allegation of readiness and willingness, either in the plaintiff or in F., to deliver them to the defendant. *Hannuic v. Goldner*, 849

(5). *Allegation of Consideration in Assumpsit.*

In an action of assumpsit, the declaration stated, that disputes and controversies were pending between the plaintiff and the defendant, as to whether or not the defendant was indebted to the plaintiff, in, to wit, the sum of 173*l.* 2*s.* 3*d.*, for money lent to and paid for the defendant by the plaintiff; and thereupon, in consideration that the plaintiff would then promise the defendant not to sue him at any time for the recovery of the said sum so in dispute between them, and would accept from the defendant the sum of £100 in full satisfaction and discharge of the same, the defend-

ant promised the plaintiff to pay him the sum of £100 within a reasonable time:—*Held*, that the declaration was bad, as not shewing a sufficient consideration for the promise; there being no allegation of any debt being due, but merely that a dispute and controversy existed respecting it. *Edwards v. Baugh*, 641

(6). *Statement of several Considerations in one Count.*

A count for £50, for goods sold and for money lent, is only *one* count, stating two considerations. *Morse v. James*, 831

(7). *In Covenant—Condition precedent.*

Covenant. The declaration stated, that, by indenture, the plaintiff demised a dwelling-house and premises to the defendant, and the defendant thereby covenanted that he would expend £100 in substantial improvements of and additions to the dwelling-house, under the direction and with the approbation of some competent surveyor, to be named by and on the part of the plaintiff. Breach, that the defendant did not expend £100 on substantial improvements and additions to the said dwelling-house, under the direction or with the approbation of a competent surveyor, to be named by and on the part of the plaintiff, but neglected and refused so to do, although the plaintiff was always ready and willing to appoint a competent surveyor to approve of such substantial improvements and additions:—*Held*, that the breach was bad, for that the appointment of a surveyor was a condition precedent to the defendant's liability to expend the £100. *Coombe v. Greene*, 480

II. *Pleas in Abatement.*

Of Nonjoinder of Co-Assignee, Statement of Title in.

To a declaration in covenant, by the executors of lessor against the assignee of the lessee, the defendant pleaded in abatement, that the estate, &c. of the lessee vested by assignment in the defendants jointly with B., who became, and from thence until &c. continued to be, such assignee, jointly liable with the defendants to perform the covenants, and that the breaches of covenant were committed by the defendants jointly with the said B.:—*Held*, bad on demurrer, for not stating the mode in which B. became assignee jointly with the defendant. *Heap v. Livingston*, 896

III. *Pleas in Bar.*

(1). *What must be specially pleaded.*

Assumpsit on a guarantie, described in the declaration as a "guarantie or agreement in writing:" plea, non assumpsit:—*Held*, that it was not a defence under the plea of non assumpsit, that, subsequently to the execution of the agreement, and whilst it was in the possession of the plaintiff, a seal was affixed to the defendant's signature, so as to make the instrument purport to be a deed, but that such defence ought to be pleaded specially. *Davidson v. Cooper*, 778

(2). *When bad as amounting to Non assumpsit.*

1. A defendant is not at liberty to traverse any single material fact, which would be included in the general issue.

The plea of non assumpsit puts in issue the consideration for the promise, as well as the promise itself. *Sutherland v. Pratt*, 296

2. Where a plea qualifies the contract stated in the declaration, and introduces a new stipulation into it, it is bad as amounting to the general issue, although in truth it only sets out what was the *actual* agreement between the parties. *Nash v. Breeze*, 352

3. To a count in assumpsit, for not accepting and paying for shares in a foreign undertaking, the defendant pleaded—1. That the contract was made in France, the plaintiff and defendant residing therein; that, by the law of France, a person who has neither the property, nor the actual nor constructive possession of a thing, cannot sell it; and that the said shares were, at the time when &c., the property of F., held by him in his own right, and not the property, nor in the actual nor constructive possession, of the plaintiff. 2. That the contract was made in France, &c.; that, by the law of France, all wagers are void; and that the contract was made by the plaintiff and defendant as in the declaration stated, for the purpose of evading the law of France, and to give it the colour of a *bonâ fide* and legal transaction, whereas, in fact, it was a wager made on the price of certain public securities on a future day:—*Held*, on special demurrer, that these pleas were bad, as amounting to the general issue. *Hannuic v. Goldner*, 849

(3). *Not guilty in Case, what in issue under.*

In case by assignees of C., a bankrupt, the declaration stated, that, before the bankruptcy, C. executed to the defendant a warrant of attorney, subject to a defeazance, stating that it was given to secure the payment to the defendant of a certain sum, to wit, 23*l.* 17*s.*, balance of account, and of any other sums which the defendant might be called upon to pay under any

guarantie &c., for C.; and alleged, that, although, at the time of executing the warrant of attorney, the defendant had not entered into any guarantie &c. for C., nor ever became liable to pay any sum of money on his behalf, and although, at the time of executing the warrant of attorney, a small sum of money, to wit, the sum of money as aforesaid, and no more, was due from C. to the defendant on the warrant of attorney and defeazance, and it was the defendant's duty to issue execution for that sum only, being such balance as aforesaid, with interest, &c., and no more; yet the defendant wrongfully caused a writ of *fi. fa.* to be issued, founded upon the judgment entered up on the said warrant of attorney, indorsed to levy 103*l.* 10*s.* for debt, costs, &c., under which the goods of C., of value sufficient to satisfy that sum, were seized and sold before the bankruptcy, and thereby wholly lost to the plaintiffs as assignees. To this declaration the defendant pleaded not guilty, and that, after the time of executing the warrant of attorney, and before the execution, a large sum of money, to wit, £100, was due from C. to the defendant upon the warrant of attorney and defeazance, in addition to the said balance of account in the declaration mentioned, on which issues were joined:—*Held*, that, on these pleadings, it was incumbent on the plaintiffs, in order to recover in the action, to prove that no more was due to the defendant than 23*l.* 17*s.*, the balance of account mentioned in the declaration. *Gough v. Cribb*, 497

(4). *Issuable Pleas.*

Where, in assumpsit for premiums of insurance, monies paid, and money due on an account stated, the defendant, being under terms of pleading issuably, pleaded as a set-off, that the

plaintiffs were indebted to him in the sum of £1500 for a total loss on a policy of assurance for freight; and the plaintiff signed interlocutory judgment, on the ground that the plea was not issuable; the Court set aside the judgment without costs, in order that the question as to the sufficiency of the plea might be argued on demurrer.

Quære, whether unliquidated losses on a policy of assurance can be made the subject of set-off:—*Semble*, that they cannot. *Thomson v. Redman*,

487

(5). *Averment of tout Temps prist, when necessary.*

To a count for money had and received, the defendant pleaded, that, after the making of the promise, to wit, on &c., the plaintiff requested him to send the said sum of money to him by post, and that he did so:—*Held* bad on special demurrer, for want of an averment, either that there was no prior request to pay, or that the defendant was always ready to pay. *Kington v. Kington*,

233

(6). *Recital of Title of Statute.*

In reciting a statute in pleading, the whole of its title must be stated, though it comprise several other subject-matters besides that to which the pleading relates. *Beck v. Beverly*,

845

(7). *Plea Puis Darrein Continuance, Form of.*

To an action for goods sold, the defendant pleaded puis darrein continuance, that the plaintiffs had become bankrupts, and that afterwards an official assignee was appointed; and further, that, after the last pleading in the cause, and within eight days now last past, the other assignees were duly chosen by the creditors:—

Held bad, for not shewing that the official assignee was appointed after the last pleading, and within eight days before the plea. *Dunn v. Hill*,
470

(8). *Nul Tiel Record—Variance.*

In an action of debt on a judgment brought against L. B. and E., his wife, the declaration alleged that the plaintiff, on &c., recovered judgment against the said E. by the name of E. R., in an action on promises, which promises were made by her the said E. whilst she was sole and unmarried. Plea, nul tiel record. On the judgment being produced in Court, it appeared to have been recovered against E. R. and others:—*Held*, this having been objected to on the ground of variance, that such objection was invalid; and that the objection, if any, should have been taken by plea in abatement. *Cocks v. Brewer*,

51

(9). *Plea of Release, when set aside.*

An action having been brought against the defendant for illegally pledging certain quantities of tobacco, and the defendant having pleaded a release given to him by one of the parties interested in the tobacco, the Court refused to set aside the plea, the releasor having an immediate interest in the money sought to be recovered, and no fraud being shewn. *Quære*, whether a Court of equity would under such circumstances set the release aside. A Court of law has no jurisdiction to set aside a release which is good in law, but in the exercise of its equitable jurisdiction it may interfere to prevent a defendant from pleading a release, where it would be a manifest fraud on a third party seeking to enforce a demand against the defendant, and where the defendant himself is a party to the fraud. *Phillips v. Clagett*,

84

(10). *Foreign Judgment — Estoppel*
—Liability of Member of Foreign
Company for Injury on High Seas.

To a declaration in case for an injury done to the plaintiffs' ship on the high seas by a ship of the defendant, then being under the care, direction, and management of certain mariners and servants of the defendant, by their negligence, the defendant pleaded as follows:—That the ship, in the declaration secondly mentioned, ran foul of the plaintiffs' ship on a certain part of the high seas, situate between the kingdoms of England and France, and out of the British dominions; that at that time the defendant was, and still is, a subject of the King of the French, and was a holder and proprietor of shares in, and acting director of, a society or company established in France, by royal ordinance, according to the laws of that kingdom, by the name of &c.; and that, at the time of the collision, the said Company, then and from thence hitherto being subjects of the King of the French, were the owners of the said ship, and by their mariners and servants were then navigating the same as subjects of the King of the French, for certain objects for which the said Company was established, and upon that part of the high seas before mentioned, and the said Company did then and there, by their mariners and servants, commit the grievances in the declaration mentioned; and that the defendant never was possessed of or interested in the said ship otherwise than as such holder and proprietor of shares; and that, by the law of France, the defendant was not, at the time of the committing of the grievances, or from thence hitherto, *responsible for or liable to be sued or impleaded individually*, or in his own name or person, in respect of the causes of action in the declaration

mentioned, but the said Company alone, by their said style or title, or the master or person in command of the ship for the time being, was responsible for and liable to be sued and impleaded for the said causes of action; and that the defendant never was master, or in command of the said ship:—*Held*, that, if this plea was to be construed as meaning to aver, that, by the law of France, the defendant was not liable for the acts of the master, but that a body established by that law, and in the nature of an English corporation, were the proprietors of the vessel, and alone liable for the acts of the master, the plea was a good defence to the action: but if the plea meant only, that in the French courts the mode of proceeding would be to sue the defendant jointly with the other shareholders of the Company, under the name of their association, the plea was bad. The Court were divided in opinion which was the proper construction of the plea; Lord *Abinger*, C. B., and *Alderson*, B., adopting the latter construction; and *Parke*, B., and *Gurney*, B., the former.

The defendant pleaded also (after the same averments as to the place of the injury, the defendant's being a subject of France, and a member of the Company, &c.) that the Company, for the recovery of the damages sustained by them by the negligence and mismanagement of the plaintiffs of their said ship, sued and prosecuted, according to the law of France, a writ of summons to the plaintiffs, whereby they were required to appear before the Court of the Commercial Tribunal of Havre on a certain day, in order that the said Court might inquire whether, on the day in the declaration mentioned, the said ship of the plaintiffs did, by the negligence and mismanagement of their officers or crew, run on board of the said ship of the

Company, whereby she was sunk, and to hear themselves condemned in person and goods, &c. &c.; the said Court having jurisdiction over the said cause and the matters therein arising. The plea proceeded to state, that the plaintiffs accordingly appeared in the Court at Havre, and defended themselves against the claim of the Company, and insisted that the collision proceeded from the negligence of the servants of the defendant, as in the declaration mentioned; and that the Court adjudged that the plaintiffs' ship did, by the negligence of the plaintiffs by their officers and crew, run on board of and sink the said ship of the Company, and condemned the plaintiffs in damages: and alleged, that the said several matters of defence so insisted on by the plaintiffs in the Court at Havre, and the grievances in the declaration mentioned, were the same identical causes of defence and matters of grievance, and that the very identical question, whether the defendant, by his mariners and servants, was guilty of the grievance in the declaration mentioned, arose and became material in the said suit in the said Court at Havre; and being there examined into, it was adjudged by the said Court, having jurisdiction in that behalf, that neither the defendant nor the Company, by his or their mariners or servants, was or were guilty thereof. The plea then averred, that, by the law of France, the judgment so recovered in the French Court was an absolute and final bar to any action by the plaintiffs against the defendant in respect of the grievances and causes of action in the declaration mentioned: — *Held*, that the plea was bad in form, for not commencing and concluding by way of estoppel; and in substance, for not shewing that the plaintiffs were French subjects, or resident or present in France when the suit at Havre was

commenced, so as that they might be bound, by reason of allegiance, or domicile, or temporary presence, by a decision of the French Court.

Quære, whether, even with such allegations, the plea would have been a bar to the action. *General Steam Navigation Co. v. Guillou*, 877

IV. Replication.

(1). *When a sufficient Traverse of Plea.*

1. To a declaration in debt by the assignee of a bankrupt, the defendants pleaded, that, before the fiat, the defendants discounted a bill of exchange for the bankrupt, and then lent and advanced *and gave credit* to him for a sum of money exceeding the damages in the declaration mentioned; proceeding to allege a set-off. Replication, that the defendants did not lend or advance any sum of money to the bankrupt: — *Held*, that this traverse was not too narrow, as the lending and advancing and the giving credit appeared to be all one transaction. *Alsager v. Currie*, 14

2. To a declaration by the payees against the acceptor of a promissory note, the defendant pleaded that one T. D., the brother of the defendant, then deceased, was in his lifetime indebted to the plaintiffs in a large sum of money, to wit, to the amount in the promissory note specified; and that, after his death, and before interment, one of the plaintiffs, by a threat, that, unless the defendant would make and deliver the note, the plaintiffs would prevent the funeral of his brother from taking place, procured the making of the note from the defendant, who then made and delivered the same upon such threat, and for no other cause whatever. The plea also averred that there never was any consideration for the making of

the note, and that the plaintiffs always held the same without value. Replication, that one of the plaintiffs did not by a threat, that, unless the defendant would make and deliver the note, the plaintiffs would prevent the funeral of the defendant's brother from taking place, procure from the defendant the note, in manner and form alleged:—*Held*, that the replication was a good answer to the whole plea. *Atkinson v. Davies*, 236

(2). *Of prior Demand, to Plea of Tender.*

A declaration in assumpsit alleged, that the defendant was indebted to the plaintiff in £100 for work and labour, and in £100 on an account stated. The defendant pleaded, as to £10, parcel &c., a tender of that sum. Replication, that a larger sum than £10, to wit, £31, being part of the monies in the declaration mentioned, including the said sum of £10, was due on account of one and the same of the causes of action in the declaration mentioned, and that, before the tender, the plaintiff demanded the said sum of £31, which the defendant refused to pay:—*Held*, on special demurrer, that the replication was insufficient, as it did not shew that the £31 was due on one entire contract.

Semble, that where a sum is due on one entire contract, as on a bill of exchange or promissory note, and the defendant pleads a tender of a smaller sum, the plaintiff may reply that he demanded the larger sum, and that the defendant refused to pay it. *Hesketh v. Fawcett*, 356

V. *Rejoinder.*

(1). *When bad for Departure.*

To a declaration in assumpsit on several bills of exchange, for goods sold and delivered, &c., the defendant

pleaded a release by deed, making profert. The replication set out the deed on oyer, from which it appeared that the plaintiffs and others, creditors of the defendant, agreed to release the defendant from their claims, on his agreeing to pay them a composition of 11s. in the pound thereon, and giving certain promissory notes for the amount; with a proviso, that, in case default should be made in payment of any of the notes when due, the agreement and release should be void. The replication then averred, that default was made in payment of one of the notes, and that the same was renewed by another, which was dishonoured when due. Rejoinder, that, before such default, the defendant delivered to the plaintiffs another promissory note, which was accepted by them in lieu and satisfaction of the said first note:—*Held*, that the rejoinder was bad, as being a departure from the plea. *Nevill v. Boyle*, 26

(2). *To Replication of Non est factum to Plea of Release.*

To a plea of a release by the plaintiffs of a co-contractor with the defendants, the plaintiffs replied non est factum, to which the defendants rejoined, "that the said deed is the deed of the plaintiffs," on which issue was joined. *Semble*, that this issue would be supported by the production of the release in a cancelled state, it having been cancelled by the releasee after the plea was pleaded, but before the issue joined. *Todd v. Emly*, 1

VI. *Repleader.*

Where a replication traverses part of a plea, but leaves unanswered so much of it as forms a defence to the action, at the same time not expressly admitting it, the Court cannot give judgment non obstante veredicto, or

arrest the judgment, but the proper course is to award a repleader. *Atkinson v. Davies*, 236

POOR-RATE.

See CHURCHWARDEN, (2).

Distress for Costs.

A warrant of distress directed the officer to levy the sum of 28*l.* 5*s.* 5½*d.* (the amount of a poor-rate), and also the further sum of 11*s.* 6*d.* for costs incurred, making in the whole the sum of 28*l.* 16*s.* 11½*d.*, together with the reasonable charges of taking and recovering the said distress. The goods seized under the warrant were replevied, and the defendants made cognizance, justifying the seizure of the goods only under the 43 Eliz. c. 2, s. 19:—*Held*, that the distress was not illegal, as the defendants did nothing but what they could justify under the warrant of distress for the poor-rate alone. *Skingley v. Surridge*, 503

POWER.

See DEVISE.

POWER OF ATTORNEY.

See DEED, III.

PRACTICE.

I. *Disobedience of Order to give Name and Residence of Plaintiff—Staying Proceedings.*

Where, in an action for penalties, a Judge's order had been obtained for the delivery to the defendant's attorney of an account in writing of the particulars of the place of residence and occupation of the plaintiff, with a stay of proceedings in the mean time, and a description was accordingly delivered in pretended compliance with the order, but which after verdict was discovered to have been

falsely and fraudulently given:—*Held*, that this was not a sufficient ground to stay or set aside the proceedings, the defendant not shewing that he had in fact been prejudiced thereby in his defence to the action; but that the parties guilty of the fraud were punishable for the contempt of Court. *Semble*, that, if the defendant be dissatisfied with the answers given, he should apply at the time for an order for better or more ample information. *Smith v. Bond*, 326

II. *Setting aside Proceedings on Bail-bond.*

Where a *capias* issues against a defendant, under the 1 & 2 Vict. c. 110, s. 4, and he gives a bail-bond to the sheriff according to the statute, but omits to perfect bail in due time according to the practice of the Court; the Court will, on his afterwards putting in and perfecting bail, set aside, on payment of costs, proceedings which have in the mean time been commenced upon the bail-bond. *Ede v. Collingridge*, 61

III. *Undertaking to plead issuably, how waived.*

Where a defendant being under terms to plead issuably, the plaintiff, before the time for pleading is out, obtains an order for leave to amend the declaration by adding a particular allegation, the defendant having liberty also to plead traversing that allegation, and the declaration is amended accordingly, the undertaking to plead issuably is thereby done away with. *Hutt v. Giles*, 756

IV. *On Appeal from Judge at Chambers—Affidavits.*

Although, on an application to rescind a Judge's order made under 1 & 2 Vict. c. 110, for the arrest of

a defendant, or for refusing to discharge him out of custody, either party, on cause being shewn, may produce additional affidavits, yet those used before the Judge at chambers ought to be brought before the Court. *Heath v. Nesbitt*, 669

V. Judgment as in case of Nonsuit.

(1). Motion for, when to be made.

The rule as to the time for moving for judgment as in case of a nonsuit is the same in cases to be tried before the sheriff as in those at Nisi Prius. *Harrison v. Jones*, 105

(2). What a Default.

Where a plaintiff abstains from trying the cause at the assizes for which he has given notice of trial, in consequence of a proposal from the defendant that it shall await the event of another action against the defendant, and that is determined in time to enable the plaintiff to go to trial at the next assizes, his not doing so is a default which entitles the defendant to move for judgment as in case of a nonsuit, and he is not bound to take the cause down by proviso. *Garven v. Birch*, 544

(3). Entering Stet Processus on Part of Record.

Where, in an action of covenant, several breaches were alleged in the declaration, to which there were separate pleas, some of which were demurred to, and on the others issues of fact were joined; and, judgment having been given for the defendant on the demurrers, the plaintiff did not proceed to trial with the issues in fact, whereupon the defendant obtained a rule for judgment as in case of a nonsuit; but the defendant having become bankrupt since the issues were joined, a stet processus was offered

by the plaintiff:—It was *held*, that, inasmuch as the defendant's right to the costs of the demurrer had already accrued, the stet processus could only extend to the issues of fact, leaving the defendant to recover his costs of the demurrer. There being, however, a difficulty as to entering a stet processus to a part of the record, it was agreed that the plaintiff should enter a nolle prosequi as to such parts of the declaration as related to the issues of fact, the defendant consenting that the plaintiff should not be liable to costs on the nolle prosequi. *Quarlington v. Arthur*, 491

PRESCRIPTION.

For Coal-mine.

The right to a given substratum of coal lying under a certain close is a right to land, and cannot be claimed by prescription. Aliter, of a right to take coal in another man's land. *Wilkinson v. Proud*, 33

PRINCIPAL AND AGENT.

See CONTRACT OF SALE.

PRISONER.

Discharge of, under 48 Geo. 3, c. 123.

Where a defendant had lain in prison twelve months for a debt not exceeding £20 the Court discharged him on notice of the application to the plaintiff's attorney, who was also his son, the plaintiff being dead, and the attorney refusing to give any information who was his personal representative. *Poole v. Steed*, 759

PROCESS.

I. Writ of Summons.

(1). Duration of.

Where a writ of summons is not served until after four calendar months from the date of it, the proper course

is for the defendant to apply to the Court to set it aside, and not to treat it as a nullity. *Hamp v. Warren*, 103

(2). *Description of Defendant in.*

The description of the residence of the defendant in a writ of summons is immaterial. *Windham v. Fenwick*, 102

(3). *Setting aside for Service in wrong County.*

A party seeking to set aside the service of a writ of summons, on the ground of its having been served in a wrong county, must state positively that the place of service is not within the county into which the writ issued, or within the prescribed distance from the boundary thereof; and it is not sufficient to state that he has *been informed and believes* that the place of service is more than half a mile from the county into which the writ issued. *Harrison v. Wray*, 815

II. *Capias ad Satisfaciendum.*

Execution of, against bedridden Debtor.

Where a defendant had been arrested on a ca. sa., but was too ill to be removed from his house without danger to his life, the Court enlarged the time for returning the writ, but could not afford the sheriff any relief against the extra costs of keeping up the caption. *Jones v. Robinson*, 758

RAILWAY.

Power of making, under Canal Act, how exerciseable.

By an act of the 32 Geo. 3, for making a canal in the county of N., the "owners or proprietors of any mines of coal" within certain parishes were empowered to make any railways or roads to convey their coals, &c. to

RESTRAINT OF TRADE.

the said canal, over the lands or grounds of any person or persons, paying or tendering satisfaction &c. for the damage to be thereby occasioned:—*Held*, that this power was not limited to persons who were proprietors at the time of the passing of the act, or of the making of the canal, but extended to other persons who had become so since, and that such owners or proprietors were empowered to make railroads to be traversed by locomotive engines. *Bishop v. North*, 418

RELEASE.

See DEED, V.

PLEADING, III. (9).

REPLEVIN.

See SHERIFF, (4).

TURNPIKE ACTS, (1).

RESTRAINT OF TRADE.

Covenant.—By articles of agreement under seal, it was agreed that the defendant should become assistant to the plaintiffs in their business of surgeon dentists for four years; that the plaintiffs should instruct him in the business of a surgeon dentist, and that, after the expiration of the term, the defendant should not carry on that business in London, or in any of the towns or places in England or Scotland where the plaintiffs might have been practising before the expiration of the said service. The declaration alleged as breaches, first, that, after the term, the defendant carried on the said business in London; secondly, that the plaintiffs had, during the said term, carried on business in Great Russell Street, Bloomsbury, yet the defendant after the term carried on the said business in the same place. Plea, to the first breach, that London was a large and populous district, containing, 1,500,000 inha-

bitants, and that the stipulation in the agreement was an undue, unreasonable, and unlawful restriction of trade. Plea to the second breach, that, before the expiration of the service, the plaintiffs had practised in very many towns in England, and, amongst others, London, Preston, Oswestry, &c., and that divers of the said towns were distant from each other 150 miles; wherefore the said stipulation was an unreasonable restriction of trade, and the said agreement, as to so much, was wholly void:—*Held*, that the first plea was bad, as the covenant not to practise in London was valid, the limit of London not being too large for the profession in question; and that the latter part of it was also bad, for attempting to put in issue matter of law, viz. the reasonableness of the restriction. *Sem- ble*, that, in considering the question of restriction, the populousness of particular districts ought not to be taken into consideration. *Held*, secondly, that the stipulation as to not practising in towns where the plaintiffs might have been practising during the service was an unreasonable restriction, and therefore illegal and void; but that the stipulation as to not practising in London was not affected by the illegality of the other part. Every restraint of trade which is larger than what is required for the necessary protection of the party with whom the contract is made is unreasonable and void, as injurious to the interests of the public, on the ground of public policy. *Mallan v. May*, 653

SCIRE FACIAS.

See HUSBAND AND WIFE, (2).

I. *To revive Judgment.*

Practice as to service of a rule for scire facias to revive an old judgment. *Macdonald v. Maclaren*, 465

II. *To have Execution against Members of Joint-stock Company.*(1). *Proceedings on.*

By an act of Parliament for creating a joint-stock company, (the Patent Rolling and Compressing Iron Company), it was enacted, that the Company should cause to be inrolled in Chancery a memorial of the names, residences, and descriptions of the shareholders of the Company. Another clause provided, that the expenses of applying for and obtaining the act should be paid out of the funds of the Company, in preference to all other payments whatsoever. The memorial inrolled under the act contained the names of *John Batty*, carrier, of Wolverhampton, and of *William Ryton*; and on an application for a scire facias to have execution under the act against *William Batty* and *William Ryton*, in an action for an expense incurred in obtaining the act, it was sworn, on the part of the plaintiffs, that the defendant *William Batty* was by mistake called and inserted in the memorial as *John Batty*: for the defendants, it was sworn that there was no such person as *William Batty* who was a shareholder of the Company, and also, that the other defendant *Ryton* was not a shareholder. Notice had been given to the defendants that the Court would be moved that an execution might issue against them:—*Held*, first, that the allegations of the defendants were no answer to the application for a scire facias; secondly, that the remedy of the plaintiffs was not against the funds of the Company only, but that they had a right of action against the individual shareholders; and, thirdly, that the defendants, having received notice that an execution (not a scire facias) would be moved for, were entitled to their costs of appearance, unless they shewed

cause on the merits. *Clowes v. Bret-tell*, 461

(2). *Pleadings in.*

1. A declaration in sci. fa. stated, that the plaintiffs recovered against one B., as secretary to the Patent Rolling and Compressing Iron Company, a certain debt then due and owing from the Company to the plaintiffs, and averred that the defendants and others were, at the time of the recovery of the judgment, and from thence have been and still are, shareholders of the Company. Plea, that B. was not secretary pursuant to the statute creating the Company, modo et formâ, as in the scire facias alleged, concluding to the country:—*Held*, first, that the plea was bad, as it traversed an allegation not contained in the declaration, concluding to the country. Secondly, that the declaration, stating a judgment to have been obtained against B., as secretary to the Company, for a debt due from the Company, was sufficient, and that it need not allege that B. was secretary at the commencement of the original suit, for if he were not so the proceeding would be erroneous, which the Court will not presume. *Semble*, that, even if he were not such secretary, the judgment having been obtained against him, the Company would still be bound by it, and that, if the nominal defendant collusively suffers judgment by default, the shareholders should apply to the Court to set aside the proceedings.

By the 20th section of the Company's act, 4 & 5 Vict. c. lxxxix, a memorial of the names &c. of the directors, shareholders, and secretary of the Company was required to be inrolled in Chancery within six months after the passing thereof; and by the 24th section it was enacted, "that, until the first memorial should have been so duly inrolled, no action

or other proceeding by or against the Company should be commenced or prosecuted under the authority of the act:"—*Held*, that a plea, that the Company did not within six months cause to be inrolled a memorial of the names, &c. of the directors and secretary for the time being of the Company, and of the shareholders thereof, according to the act, was bad; for, although it was a condition precedent that the names of *some* members of the Company should be inrolled within six months before an action or suit was commenced, there was no condition that the names of every subsequent member should be so inrolled, and that that provision was not applicable to a proceeding by sci. fa. *Held*, also, that the defendants were not at liberty to plead to the declaration in scire facias any matter which might have been pleaded or set up as a defence to the original action.

By the 12th section of the act, it was enacted, that it should be lawful for the plaintiff to cause execution upon any judgment, &c. obtained by him in any such action against any such nominal party as aforesaid, to be issued against all or any of the shareholders for the time being of the Company; and that if such execution should be ineffectual &c., then it should be lawful for him to issue execution against any person who was a shareholder at the time the contract was entered into; provided, that no person, having ceased to be a shareholder, should be liable to the payment of any debt, &c. for which he would not have been liable as a partner, and the act was not to be construed to enable any party to a suit to recover from any individual shareholder any other or greater sum than might have been recovered if that act had not been passed:—*Held*, that execution must first issue against

those persons who were shareholders at the time it was issued, provided they were shareholders at the time of the contract, and would have been liable to the plaintiff if the action had been brought against them instead of the nominal defendant. And *semble*, that the defendants might have pleaded that they were not shareholders at the time of the contract being entered into. *Bradley v. Sir James Eyre*, 432

2. By an act (4 & 5 Vict. c. lxxxix) incorporating the Patent Rolling and Compressing Iron Company, it was provided, that every judgment against the nominal defendant might be executed against the person and estate of every shareholder, provided "that no such execution should issue without leave first granted by the Court in which such judgment should have been obtained upon motion in Court, and after notice of motion:"—*Held*, that the issuing of a scire facias without the leave of the Court could not be pleaded as a defence in bar of the action, but was an irregularity merely, for which an application might be made to the Court to set aside the writ. *Bradley v. Warburg*, 452

3. To a declaration in sci. fa. against a shareholder of a company on a judgment recovered against B. as the secretary of the company, the defendant pleaded, that no memorial of the names, residences, and descriptions of the directors and secretary had ever been duly inrolled in the Court of Chancery, in the manner required by the act:—*Held*, that the plea was bad, as setting up a defence which might have been pleaded to the original action. *Bradley v. Urquhart*, 456

(3). Time for setting aside.

In sci. fa. against a member of the Patent Rolling and Compressing Iron

Company, under the 4 & 5 Vict. c. lxxxix, s. 12—*Held*, that, after the defendant had pleaded, and a demurrer to the plea had been argued, and judgment given thereon for the plaintiff, the defendant was too late to move to set aside the scire facias, on the ground that it had been issued without leave first granted by the Court, as required by that statute. *Bradley v. Urquhart*, 583

III. On Bond to the Crown by Committee of Lunatic.

A bond given to the Crown by the committee of a lunatic, on his appointment, is within the stat. 33 Hen. 8, c. 39, s. 50, and the Crown is entitled to treat it as matter of record, and have a scire facias thereon. *Regina v. Chambers*, 776

SET-OFF.

See BANKRUPTCY, II. (1).
PLEADING, III. (4).

SHERIFF.

(1). *Liability of, under 8 Anne, c. 14, s. 4.*

A sheriff who seizes goods under a fieri facias, and, after notice that rent is due to the landlord of the defendant, removes the goods without such rent having been first paid, is liable for such removal, on the stat. 8 Anne, c. 14, s. 1, to an action on the case at the suit of the landlord.

In such action, no averment of notice to the execution-creditor is necessary.

Nor need it be alleged that the goods removed were goods chargeable by law with a distress.

In order to maintain the action, it must appear that the premises were held at a rent certain. And where the tenant entered into possession in

January, 1829, under an agreement made in October, 1828, whereby a lease was to be granted to him from the 20th November, 1828, but no lease was granted, and the tenant continued to occupy until the time of the execution, in February, 1842, but no payment of rent was shewn to have been made:—*Held*, that it did not sufficiently appear that he held as tenant at a rent certain, so as to bring the case within the statute, and render the sheriff liable.

Quere, whether any action lies for the landlord against the execution-creditor. *Riseley v. Ryle*, 16

(2). *Liability of, for Non-execution of Fi. Fa.—Outstanding Writs under fraudulent Judgments.*

Where goods seized under a writ, founded upon a judgment fraudulent against creditors, remain in the hands of the sheriff, or are capable of being seized by him, he is compellable, under the stat. 13 Eliz. c. 5, to seize and sell such goods under a writ afterwards received by him, and founded on a bonâ fide debt; and if he neglect to do so, having notice of the fraud, and return nulla bona to the latter writ, he is liable to an action for a false return.

Therefore, evidence of the fraud in the previous judgment and execution is admissible in such action, in answer to a defence founded on the outstanding writ.

And the conduct of the debtor in reference to the execution of the previous judgment is admissible in evidence, as a part of the fraud. *Imray v. Magnay*, 267

(3). *What Expenses allowed to, on Sale under Fi. Fa.*

A sheriff who has seized goods under a fi. fa., and disposed of them by appraisement and bill of sale, is

not entitled to deduct the expenses of the appraisement and sale; the scale of fees framed under 7 Will. 4 & 1 Vict. c. 55, applying to "sales by auction" only. *Phillips v. Viscount Canterbury*, 619

(4). *Appointment of Replevin Clerk, Evidence of.*

In an action by the assignee of a replevin bond, the defendant pleaded, that the bond was obtained from him in the name of the sheriff by T. H., under colour and pretence that he was a deputy of the sheriff for taking replevins, whereas he had no deputation or authority from the sheriff; absque hoc that the sheriff took the bond: on which issue was joined:—*Held*, that the only matter in issue was whether the sheriff took the bond; and that evidence of T. H.'s acting as the deputy of the sheriff was sufficient primâ facie evidence of his appointment, and cast on the defendant the onus of proving his non-appointment. *Faulkner v. Johnson*, 581

SMUGGLING ACT.

Where customable goods are landed by bill of sight, under the 3 & 4 Will. 4, c. 52, s. 24, and are afterwards removed without payment of duties, and without a perfect entry having been made of them pursuant to that statute, they are in the situation, for all purposes, of goods illegally unshipped, and all persons who assist in removing or harbouring them, knowing due entry not to have been made, are liable to the penalties imposed by the 3 & 4 Will. 4, c. 53, s. 44. *The Attorney-General v. Hurrel*, 585

STAMP.

See EVIDENCE (2).
VENDOR AND PURCHASER.

(1). *Lease Stamp, when necessary.*

An agreement in the following terms:—"I, W. E., do hereby acknowledge that I am indebted to B., as agent of S., my landlord, in the sum of £22 for arrears of rent for the cottage in my occupation; and I do now pay the said B. the sum of 5s. on account and in part of such rent, and do hereby undertake to pay the said B. the sum of £8 per annum, by quarterly payments from Michaelmas last;" was held not to require a lease stamp. *Eagleton v. Gutteridge*, 465

(2). *On Grant of Office.*

Two persons, who had been appointed common-keepers in the manor of Wimbledon, appointed E. their deputy, by the following writing, signed by them:—"We, the undersigned, having been appointed common-keepers for the parish of Putney, hereby nominate and appoint you our deputy for the lower common, and authorize you to act for us in that behalf in all things pertaining to the rights and privileges of the lord, and the tenants of the manor, with the same powers and in the same manner as it would be our duty to act." It then went on to state what were the rights of common, and in what manner the duties of common-keeper should be exercised:—*Held*, that this document did not require to be stamped, as being a "grant or appointment of or to an office or employment," within the 55 Geo. 3, c. 184, sched. pt. 1.

That title of the act applies only to offices to which a salary, fees, or emoluments are annexed. *Roberts v. Elliott*, 527

(3). *On Mortgage.*

Where a mortgage of certain leasehold premises, subject to a proviso for redemption on payment of the principal money and interest, contained

covenants by the lessee (the mortgagor) to procure, at his own costs, renewals of the lease, (under the power contained in the original lease), and in case the mortgagor refused or neglected to do so, then it should be lawful for the mortgagee to procure such renewals; and a covenant that all the fines, costs, and expenses of the mortgagee in procuring such renewals should be a charge on the mortgaged premises, and the same should not be redeemed or redeemable until payment of such costs, charges, and expenses:—*Held*, that an ad valorem stamp of £4 was sufficient, and that the deed did not require a stamp of £25, as being a security for the repayment of money to be thereafter advanced or paid, the amount of which was uncertain and without limit. *Wroughton v. Turtle*, 561

(4). *On Deed of Declaration of Trust.*

An indenture recited, that, in consideration of £400 (part of £500 agreed to be advanced by the plaintiff to the defendant) paid to S., R., and P., by the plaintiff, in discharge of all principal and interest owing to them as mortgagees, by virtue of a certain other surrender, they, the said S., R., and P., surrendered into the hands of the lord certain lands, to the intent that the lord might re-grant the same to the plaintiff, in trust to sell the same, and retain the said sum of £500. The indenture then stated, that the defendant covenanted with the plaintiff to pay him the sum of £500, with interest, on a certain day, and that, in default of payment, the plaintiff might enter upon and enjoy the land. The indenture was stamped with two stamps, of 1*l.* 15*s.* and 1*l.* 5*s.*:—*Held*, that this was not "a declaration or deed for defeating or making redeemable or qualifying any covenant, &c., intended as a security for money," within the meaning of that

clause in the Stamp Act, 55 Geo. 3, c. 184, sched., pt. 1, "Mortgage," but a mere declaration of trust of the second surrender; and that it did not require an ad valorem stamp. *Haywood v. Bibby*, 812

TENDER.

See PLEADING, IV. (2).

Of Goods, what amounts to.

An allegation of a tender of goods is not supported by proof of a delivery or offer to deliver closed casks, said to contain them; but they should be tendered in such a way that the party may have a reasonable opportunity of inspecting them, and of ascertaining whether what he has bargained for is presented for his acceptance. *Isherwood v. Whitmore*, 347

TITHE COMMUTATION ACT.

Jurisdiction of Commissioner to entertain successive Claims of different Moduses.

Held, by the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that where a claim of a modus or other exemption from tithe is preferred before the Tithe Commissioners, appointed under 6 & 7 Will. 4, c. 71, who decide against the claim set up, the party is not precluded from setting up another claim to a different modus on the same lands, unless the commissioners have made their final award under the act; even though a feigned issue, delivered under the 46th section, be pending to try the validity of the first modus. *Barker v. Tithe Commissioners*, 320

TITHES.

See MAINTENANCE.

TURNPIKE ACTS.

TOLLS.

See TURNPIKE ACTS, (2).

TRESPASS.

See BANKRUPTCY, II. (2), 1, 2.

TROVER.

See BANKRUPTCY, III. IV.

TURNPIKE ACTS.

- (1). *Construction of—Duty and Liability of Surveyor of Turnpikes—Costs—Replevin, when it lies against Justices.*

One of the defendants, who were magistrates, having received information on oath that a certain turnpike road was out of repair, summoned the surveyor of the road, under 5 & 6 Will. 4, c. 50, s. 94, to appear at a special sessions. At that sessions the two defendants ordered A. B. to view the road, and report thereon to them at another special sessions. A. B. having reported at the latter sessions, when the plaintiff was present, that the road was out of repair, the defendants ordered the surveyor to repair it within six weeks, and at the same time ordered him, under stat. 18 Geo. 3, c. 19, s. 1, to pay 2l. 3s. as costs. The plaintiff having refused to pay this sum, and his goods having been taken as a distress by warrant from the defendants, he replevied them, and brought the present action of replevin:—*Held*, first, that a single magistrate had no authority, under 5 & 6 Will. 4, c. 50, s. 94, to summon the surveyor of turnpike roads.

Secondly, that the defendants could not inflict costs under the stat. 19 Geo. 3, c. 19, s. 1.

Thirdly, that the defendants were not justified in inflicting costs upon the plaintiff, since, not having dis-

obeyed the order of justices, he had not committed any offence.

Fourthly, that an action of replevin would lie against the defendants.
George v. Chambers, 149

(2). *Liability of Turnpike Trustees to Mortgagee of Tolls.*

By a local act, (29 Geo. 2), the trustees of certain turnpike roads were empowered to borrow money at interest upon the credit of the tolls, and to assign them by way of mortgage as a security, such money to be repaid out of the money arising from the tolls, and, after payment of the expenses of the act of Parliament, to be disposed of as the said tolls and duties were directed by the act to be disposed of.

The plaintiff's testator having advanced £200 on these tolls, the turnpike trustees by deed assigned one-twentieth part of the tolls to secure the £200 and interest; and the plaintiff having brought an action of debt for £400, the interest due, and averred in the declaration that the tolls received were sufficient to pay all the interest on all the sums advanced on the credit of the tolls:—*Held*, on special demurrer to the declaration, that the plaintiff was not entitled to maintain an action against the trustees to recover the interest. *Pardoe v. Price*, 427

USURY.

A party having applied to the defendant for the loan of a sum of £6700 for twelve months, on the security of a mortgage of freehold property, the defendant refused to advance the money unless the borrower would give him a promissory note for the amount, to be discounted by him at £5 per cent. This the borrower agreed to, and a bond and mortgage

were given for £6700, and the sum of £6365, the amount of the note minus the discount and charge of preparing the securities, was paid to the borrower. An ejectment having been brought to recover possession of the premises, on the ground that the mortgage was invalid as being given for an usurious consideration, the jury found that the primary object of the transaction was the discounting of the note, the mortgage being only a collateral security in the event of the note not being paid:—*Held*, that the transaction was not usurious, and that the mortgage was valid independently of the recent statutes, 7 Will. 4 & 1 Vict. c. 80, and 2 & 3 Vict. c. 27.
Doe d. Haughton v. King, 333

VENDOR AND PURCHASER.

Right of Purchaser to inquire into Vendor's Title—Stamp.

One W. T., being possessed of certain copyhold premises, mortgaged the same to P., and by the indenture of mortgage covenanted to surrender them into the hands of the Dean and Chapter of W., the lords of the manor, to the use of the defendant, who was to be a trustee to sell the premises, in the event of default being made in payment of the mortgage money. W. T. made no surrender in pursuance of the above indenture, but died after devising all his real property to certain trustees; subsequently to the death of W. T., the lords of the manor, at the nomination of the defendant, granted the property in question to certain persons upon the said trusts, &c. mentioned in the indenture of mortgage. W. T., in his lifetime, surrendered other property to the lords of the manor, by way of mortgage to C., in consideration of a loan of £100, and by an indenture of even date covenanted, amongst other things, to repay the money borrowed, and gave the

mortgagee a power of sale, in case of default in payment of the money. That indenture was stamped with an ad valorem stamp of 1*l.* 10*s.* The defendant sold the whole of the above property to the plaintiff under the following conditions of sale:—that he should deduce a good title to the premises for the lives by which they were held under the Dean and Chapter of W.; but that no earlier or other title should be deduced, or any deed or document produced anterior to the last copy of court-roll, by which the premises were granted:—*Held*, first, that the defendant shewed no title in himself, as no surrender of the premises had been made to his use by W. T., and that the vendee was not precluded by the conditions of sale from making this objection to the title, as it appeared on the face of the abstract delivered. Secondly, that the stamp of 30*s.* was sufficient. *Sellick v. Trevor*, 722

WARRANT OF ATTORNEY.

Setting aside, for insufficient Attestation.

An application to set aside a warrant of attorney, on the ground of its not having been duly attested in compliance with the statute, can only be made by the party himself, or by an attorney employed and authorized by him for that purpose. *Lewis v. Lord Tankerville*, 109

WAY.

Dedication.

There may be a dedication of a way to the public for a limited purpose, as for footway, &c.; but there cannot be a dedication to a limited part of the public, as to a parish. And such a partial dedication is simply void, and will not operate in law as a dedication to the whole public.

In order to constitute a dedication

WITNESS.

of a way to the public by the owner of the soil, there must be an intention so to dedicate, of which the user by the public is evidence, subject to be rebutted by contrary evidence of interruption by the owner. *Poole v. Huskinson*, 827

WAY-LEAVE.

See RAILWAY.

WHARFINGER.

See LIEN.

WILL.

Revocation of, by Obliteration—Unattested Codicil.

A testator, by his will duly executed, devised certain real estates to R. N. in fee, subject to and charged with an annuity of £600 a year, which he gave to his daughter E. J. for her life, with powers of distress and entry on the devised estates, in case the annuity were in arrear. He subsequently erased with a pen the word "six," and inserted over it the word "two," leaving however the word "six" legible, in each place where it occurred; and on the same day he added a memorandum or codicil to his will, signed by him in the presence of *one witness* only, recognizing the above alterations:—*Held*, that the substitution of "two" for "six" hundred was, under these circumstances, inoperative, and that E. J. retained a legal interest in the annuity of £600. *Locke v. James*, 901

WITNESS.

Examination on voir dire, Time for.

Where a witness for the defendant, to whom several questions had been put in his examination in chief, stated, in answer to a question put to him by

the plaintiff's counsel, who had interposed, that he was answerable to the defendant's attorney for the costs, and was thereupon objected to as incompetent:—*Held*, that the objection did not come too late. *Jacobs v. Layborn*, 685

WORK AND LABOUR.

See GOODS SOLD AND DELIVERED.

WRIT OF TRIAL.

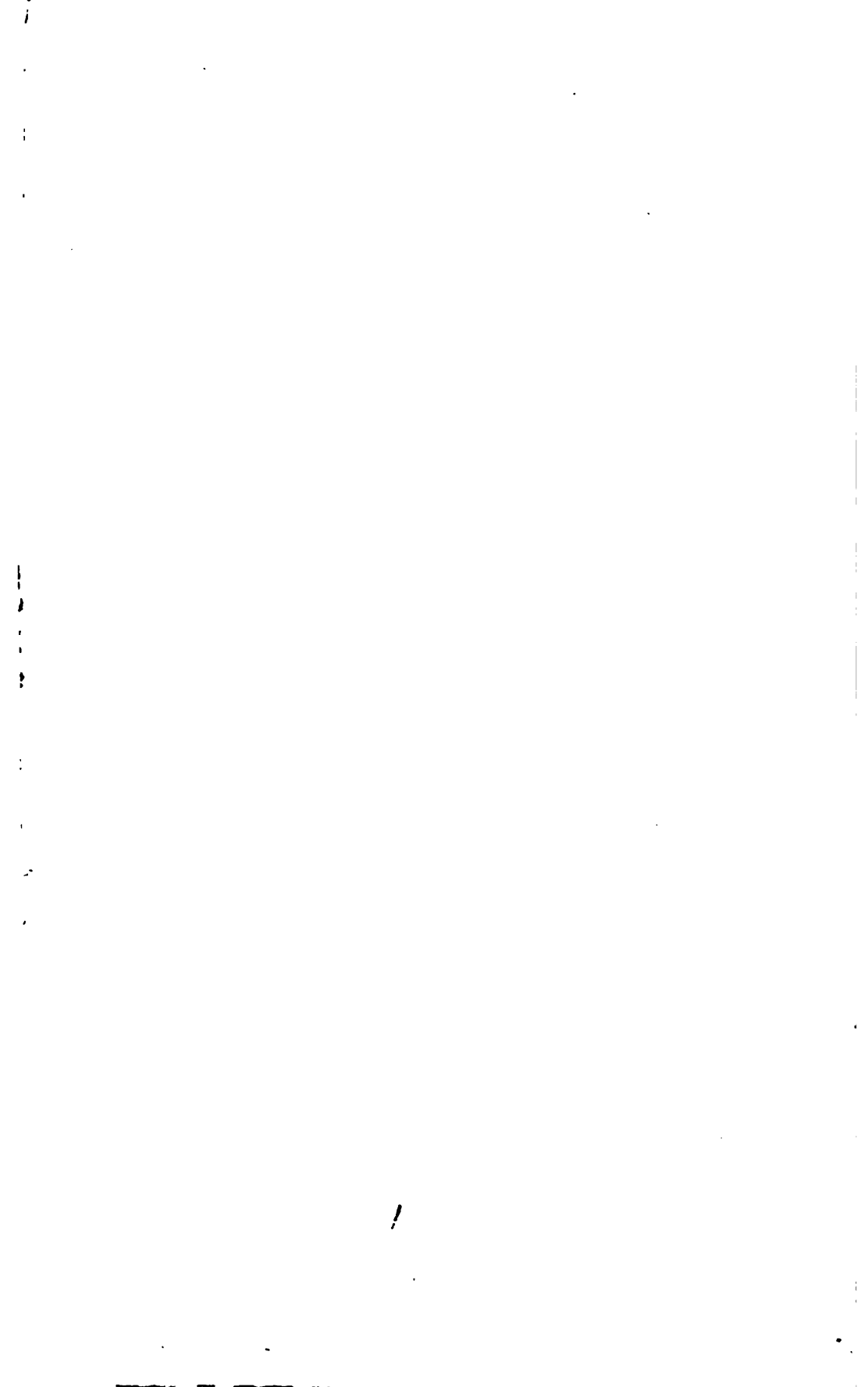
Mis-trial for wrong summoning of Jury.

After verdict in a cause tried before the sheriff under a writ of trial, the Court will not entertain an objection which was not made at the trial, that the jury was wrongly summoned, and was composed of persons who were not on the jury list for the county. *Kington v. Groom*, 826

THE END.

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